FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

In the Matter of:	)
SCHERING-PLOUGH CORPORATION,	)
a corporation,	)
and	)
UPSHER-SMITH LABORATORIES,	) File No. D09297
a corporation,	)
and	)
AMERICAN HOME PRODUCTS,	)
a corporation.	)
----------	)

Tuesday, March 12, 2002

2:00 p.m.

TRIAL VOLUME 30

PART 1

PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL

Administrative Law Judge

Federal Trade Commission

600 Pennsylvania Avenue, N.W.

Washington, D.C.

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P R O C E E D I N G S

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JUDGE CHAPPELL: Good afternoon, everyone.

ALL COUNSEL: Good afternoon, Your Honor.

JUDGE CHAPPELL: Okay, let's reconvene docket 9297.

Do the parties have anything new to bring up before we hear oral argument?

MR. CURRAN: Nothing for Upsher-Smith, Your Honor.

JUDGE CHAPPELL: Really? Usually after a day off, you guys come up with something new.

MR. NIELDS: Nothing from Schering, Your Honor.

JUDGE CHAPPELL: Okay, I think -- Ms. Bokat?

MS. BOKAT: I have one thing, but I think it might be better kept until after we've heard arguments, because it could disappear.

JUDGE CHAPPELL: All right, then we'll wait.

I think I first want to hear argument on the pending motion to dismiss, and then I will move to the motions to exclude.

MR. CURRAN: Very good, Your Honor.

JUDGE CHAPPELL: So, I think you might need to retool your order of appearance.

MR. CURRAN: We do, but I think we can do that

on a moment's notice, particularly because, Your Honor, Mr. Gidley is going to handle that motion, and then later you will hear from me on the rebuttal issue. So, if Mr. Gidley may approach the lectern now?

JUDGE CHAPPELL: Ms. Bokat, is the Government prepared to present argument on the motion to dismiss at this time?

MS. BOKAT: Yes, we are, Your Honor.

JUDGE CHAPPELL: Okay, thank you.

Go ahead, Mr. Gidley.

MR. GIDLEY: Thank you. Good afternoon, Your Honor --

MS. BOKAT: Oh, one point on that, Your Honor, if I may -- I'm sorry, Mr. Gidley -- we have filed a response to Upsher's motion that was filed late, it was filed yesterday for leave to reply.

JUDGE CHAPPELL: The reply, yes.

MS. BOKAT: And so we think it was late for two reasons, because it didn't come in until two weeks after our answer was filed, and it arrived on the eve of this oral argument. So, we oppose that leave to file a reply, and we don't think the reply should be considered. We think this argument should be confined to Upsher's original motion and our answer.

JUDGE CHAPPELL: Okay, and you filed -- has

that been filed already?

MS. BOKAT: Yes, it should have been filed this morning.

MR. GIDLEY: We received a copy, Your Honor.

JUDGE CHAPPELL: Okay, in that pleading, do you move to strike or do you also want to file your own response? I haven't seen it. What relief are you requesting?

MS. BOKAT: Excuse me just a minute, Your Honor. We certainly did not attach a response, and I don't believe we asked -- ah, here we go, excuse me. We simply opposed their motion for leave to file a reply.

MR. GIDLEY: I have a copy of it, Your Honor.

JUDGE CHAPPELL: I haven't seen that. I suppose it's in my in-box.

MS. BOKAT: I have --

JUDGE CHAPPELL: Why don't we go ahead with the argument. If I agree with that -- if I agree with that motion, then I will disregard the reply portion.

MR. GIDLEY: Your Honor, if I may put a very brief response to the argument of Ms. Bokat against the reply memo --

JUDGE CHAPPELL: Well, if you are going to do that, let me see a copy of the Government's motion.

MR. GIDLEY: Very good, Your Honor. May I hand it up?

JUDGE CHAPPELL: Yes. Thank you.

MR. GIDLEY: Let me start by cutting to the chase. I don't think it will actually change today's argument, but I would say the following, Your Honor:

First, I believe in every instance where parties have appeared at this lectern and requested a reply brief, Your Honor has granted leave for reply.

Second, I'm not aware in the rules that there's an actual time limit for the reply, and in this case, Your Honor, with the additional time that was granted to complaint counsel, the amount of time between their response and our original motion and between our response to their -- our reply to their response is approximately the same, about two weeks.

And finally, Your Honor, the -- as I understand it, we can set forth grounds for leave to file a reply memorandum, and I would put into the record the following grounds:

We stated generally that there were distortions of the record. We frankly didn't want to go into those other than what were in our brief, but I would just mention briefly, Your Honor, first the reliance of complaint counsel on Gypsum and Nippon Paper, which are

Section 1 cases, for the mental state required under specific intent when you have conspiracy to monopolize, is misplaced.

Second, Your Honor, in footnote 58 on page 24, the reliance on Instructional Systems Development Corp, we can't find the parenthetical attributed to that case in the case, and the actual discussion of the case by the Tenth Circuit we believe supports the line of cases we cited on specific intent.

And finally, Your Honor, we did call attention in the reply brief to the fact that complaint counsel relied on the investigational hearings despite this Court's very express ruling. They relied on IHs from Kapur and from other Schering executives, and Your Honor had been most explicit that those IH exhibits cannot be used against a party that was not present, and, of course, my client, Upsher-Smith, was not present at those investigational hearings.

JUDGE CHAPPELL: Ms. Bokat, since he presented argument against your motion, do you want to argue in favor of your opposition?

MS. BOKAT: Your Honor, we are not making a substantive argument in response. Our argument is merely that this was filed two weeks after our answer and less than 24 hours before oral argument. We don't

think it should be heard.

JUDGE CHAPPELL: Okay, assuming I'm going to hear it, then I would allow the Government to file I suppose a -- what would it be, a response to the reply or a --

MR. GIDLEY: A surreply, if you will?

JUDGE CHAPPELL: -- surresponse, surrebuttal? Would you like to do that?

MS. BOKAT: Yes, Your Honor.

JUDGE CHAPPELL: And how much time would you need?

MS. BOKAT: I don't know. Our crew is trying to write findings and put on a rebuttal case. You could make a very good argument that this whole business of the motion to dismiss, given where we are in this trial, we've already heard not only the case in chief but the entire defense, could best be put over until the initial decision.

JUDGE CHAPPELL: Well, I understand that, but that's because we have a very lengthy and detailed motion to dismiss, and it's a lot more detailed and in depth than the normal perhaps formality that you hear when the Government rests. So, that's why I'm giving it due consideration.

MS. BOKAT: Right, and we're not saying that

the initial motion and our answer should not be considered. Those have all been filed. They are going to be argued this afternoon. If the Court wishes to take its time to consider those, fine.

I don't think this reply should be considered, and I don't really think we should be spending our time making a written response to the reply. We will do that if the Court wants to hear the reply. I think the time of all of the parties and the Court at this stage would be better devoted to concluding the trial, promptly filing the post-trial pleadings, proposed findings of fact, proposed conclusions of law, and then the Court have time to write its initial decision rather than being distracted by the motion to dismiss.

JUDGE CHAPPELL: I'm not saying I am instructing you to do another brief. I'm asking if you would like to do another brief if I determine that I want to review or allow their reply to be filed.

MS. BOKAT: If the Court allows the reply, we would like the opportunity to do so.

JUDGE CHAPPELL: Okay, I'll let you know.

MS. BOKAT: Thank you.

JUDGE CHAPPELL: Go ahead, Mr. Gidley.

MR. GIDLEY: Thank you, Your Honor.

In the first part of my argument, Your Honor,

what I would like to do is review what is almost a distant memory for counsel and maybe even for the Court, and that is the six-witness case that was the case in chief for complaint counsel, and if you would, Your Honor, we have put on the ELMO three fact witnesses and three expert witnesses that complaint counsel put before this Court, and what I would like to do, Your Honor, is briefly review the high points of that testimony with respect to our motion to dismiss.

The Court may remember Dean Goldberg of United Healthcare, an HMO, testified, and he made the following four points, which are fundamental to our motion to dismiss.

First, the Court may recall that he had a formulary, a list of drugs, various types and formats of potassium, such as effervescents and so forth, and he testified that all of the different types of potassium electrolytes carried in their formulary were therapeutically equivalent.

Second, you may recall that Mr. Crowe, who handled the cross examination, asked the witness to number the number of drugs, both generics and branded drugs, that were potassium products. There were 24 when Mr. Crowe conducted his examination, and all 24, Mr. Goldberg testified at page 154, were

therapeutically equivalent.

Third, the Court at the end of the testimony of Mr. Goldberg asked him point blank, is there a difference in the time release mechanism between the wax matrix tablet and the K-Dur tablet, since the Court had heard in opening argument that there might be some product differences. Mr. Goldberg testified clearly at pages 174 to 175 that they have the same release mechanism, and they operate effectively the same on the human body.

Finally, Mr. Goldberg admitted that only 30 percent of United Healthcare's potassium in the month of August 2001, only 30 percent was filled with K-Dur 20. One might have thought in the early briefings of this case that K-Dur 20 was some elixir of life, a unique product that had no substitute. The testimony of Mr. Goldberg punctured that myth.

The second witness that was up was Russell Teagarden. He was with Merck-Medco. The Court may recall that Merck-Medco is one of these PBMs. They are an outfit that have a very large number of customers and a strong ability to influence pricing in the health care industry. Mr. Teagarden made, again, four points that are very important to our motion and to the reasons why we do not believe complaint counsel have

stated a prima facie case.

First, you may recall, Your Honor, that again there was a formulary, and by certain drugs one dollar sign, two dollar signs or three dollar signs were listed in the Merck-Medco formulary, and K-Dur 20, which had two dollar signs, had a comparable price with other branded potassium products. That testimony is at pages 214 to 215.

Second, Mr. Teagarden testified in 1993, 1994 and 1995 and 1996, K-Dur 20 was not part of the Merck-Medco PBM formulary, and again, that punctures the myth that there's some kind of group of people that can only take K-Dur 20. He was asked point blank by Mr. Crowe, could a doctor prescribe two 10 mEq potassium chloride tablets rather than the single K-Dur 20, and he testified at pages 257 to 258 that it would have the same therapeutic effect.

And finally, Your Honor, he testified that a variety of potassium products can be used to treat patients with potassium deficiencies.

Now, that takes me to the third and final witness, Larry Rosenthal. You may recall Mr. Rosenthal had come from I think Florida, where Andrx is headquartered, and Andrx is one of these generic companies. Andrx is the only company that complaint

counsel contended had been blocked by the so-called 180-day Hatch-Waxman Act. You may recall, Your Honor, that you had denied our motion to dismiss, because it could be conceivably the case that the 180-day exclusivity under the Hatch-Waxman Act had been manipulated to actually block another generic company.

Mr. Rosenthal punctured that myth under cross examination by Mr. Curran. First, he testified unequivocally that his company, Andrx, has not been blocked by Upsher's 180-day period, and the Court will recall at the time he was testifying, which is at the very tail end of the 180 days, that at that point in time, the 180 days was public. It was part of the FDA web site, expiring February 28th, 2002.

Second -- and I have to be careful in this sentence, because this part of the testimony is in camera, and I don't think we need to go in camera for this argument -- he testified at length about the issues that surround a potential product they could bring to market that might be competitive. Suffice it to say, Your Honor, on the public record that the 180 days was explained tediously in the cross examination as not blocking Andrx from introducing a generic to K-Dur 20.

Third, Mr. Rosenthal testified that the Andrx

Corporation will not bring a drug to market while a patent infringement lawsuit is pending. You may recall that there was a New York lawsuit that was pending over Prilosec, which I believe is the number one prescription drug in America. His company, Andrx, would make hundreds of millions of dollars in profits if they could bring that drug out, but the damages and cataclysm that would occur to Andrx if they brought the drug out and later on lost an appeal or in the District Court were such that they made the gut-wrenching decision not to introduce that drug.

Finally, he testified about a pentoxifylline generic that Andrx had. He testified that pentoxifylline was believed to be valuable in the summer of 1997, exactly when we licensed -- "we," Upsher-Smith -- licensed Schering-Plough, but that later on the pentoxifylline market had fallen out of bed.

Now, those were the three fact witnesses that complaint counsel chose to bring to this courtroom. To be sure, there were other witnesses on their fact witness list, but these are the only three witnesses complaint counsel proffered in their case in chief.

That brings us to the expert witnesses. There were three. Professor Bresnahan testified at length,

almost a week, and the Court certainly recalls Professor Bresnahan. I will only deal in summary with the points that Professor Bresnahan unequivocally conceded to defendants.

First, he testified that this whole business of reverse payments is a new area for economists. Your Honor had said it's a new area for lawyers. He testified it's a new area for economics.

Second, he proffered a Bresnahan test, which he testified he created in August of 2001 for the purpose of this lawsuit. It has not appeared in print. It has not appeared in the economics literature. It is not peer reviewed. It's created for this Court. And complaint counsel abandoned the Bresnahan test in their responsive papers.

Third, Professor Bresnahan testified that the time frame for his three-prong test has to be evaluated as of June of 1997. So, if there is market power or monopoly power, it is to be evaluated as of June 1997.

And in terms of those three up-front payments, the ones that are bandied about in this courtroom and in pleadings about $60 million, he testified unequivocally that the promise of Schering to Upsher-Smith was only worth 54.5, which has broad ramifications for the complaint counsel's case.

Moreover, he testified with respect to the six product licenses and six supply agreements, that each of those 12 items of consideration had positive value. Your Honor will recall that those are found in paragraphs 7 through 10 of I believe it's CX 338, the June 17, 1997 agreement. There are six exclusive product licenses that go to Schering-Plough. There are six commitments to supply product, six supply agreements to supply product at Schering-Plough's whim at Upsher-Smith's cost. There's no profit margin involved.

Now, we've heard a lot of talk in this courtroom and particularly in the response that the complaint counsel are abandoning the 20 mEq tablet and capsule product market definition, because they were not able to respond to the Brown Shoe indicia, and the Brown Shoe indicia are those seven practical indicia the Supreme Court outlined and which have been a part of Hornbook antitrust law for some 30 years.

They now want to talk about an Indiana Federation of Dentists case, and apart from the points that we have made recently, I would point out to Your Honor, there is no factual basis for an Indiana Federation of Dentists monopoly power argument either in terms of reduced output or in terms of an ability to

raise prices.

Professor Bresnahan testified with exceeding clarity that he did not have a pricing data set that was comprehensive for K-Dur 20, which is an astonishing admission given the two and a half years of discovery, investigational hearings and so forth. He did not have one.

Second, he did not have a five-year pricing data set for any of the competitors.

Third, he admitted under cross examination that branded potassium was comparable -- "comparable," his word -- in price to K-Dur 20.

Fourth, he did not do any econometrics or any statistical work. He couldn't, because he didn't have access to any data set. That had not been provided by complaint counsel.

Now, he did bring out for the first time -- it didn't appear in his report -- the so-called CX 1596. That's the chart that does this (indicating), the X chart, where K-Dur 20 is going along, and then it drops off in the summer, and then it plummets in the fall of 2001, and Klor Con M20 begins its sales in September of 2001.

All that chart proves is that mandatory state substitution laws work and that pharmacists comply with

the mandatory state substitution laws such as the ones pointed out in their response in Connecticut. Those are laws, Your Honor, that don't have a free market. They don't provide a level playing field between K-Dur 20 and Klor Con M20.

In the State of Connecticut, according to their brief, if a pharmacist gets a prescription for K-Dur 20, he must or she must substitute Klor Con M20. That's not the presence of competition. That's the fine hand of government forcing the substitution.

Now, Professor Bresnahan wraps this in the cloak of switching costs, and he says there are no switching costs when the State of Connecticut forbids doctors or pharmacists, I should say, from prescribing Klor Con -- K-Dur 20 in lieu of Klor Con M20.

First, Your Honor, he testified unequivocally that demand begins at the prescription pad. Demand for -- begins at the prescription pad. In other words, in the doctor's office, there are no switching costs, and that's why my client, Upsher-Smith, spent hundreds of thousands of dollars, which was real money to Upsher-Smith, influencing the doctors and trying to get them to write Klor Con 10, two Klor Con 10s, instead of the K-Dur 20.

In terms of the switching costs at the

pharmacist's office, all the pharmacist has to do is place a call, which Professor Bresnahan testified costs about 50 cents if you don't have a good contract with Verizon.

That brings us the Nelson Levy. Dr. Levy is the one and only valuation expert, but he eschews all of the economic techniques of economic valuation well known to complaint counsel. Dr. Levy testifies in a cursory, almost conclusory manner that Niacor-SR was not worth $60 million. $60 million was grossly excessive for Niacor-SR.

As a matter of logic, Your Honor, that doesn't support a reverse payment, because Dr. Bresnahan has testified that the relevant number is not $60 million, but $54 million. So, he's off by 10 percent.

More fundamentally, as a matter of logic, he doesn't value the other five products, like pentoxifylline, Prevalite, Klor Con 8, 10 and M20. None of those things have any quantitative valuation by Dr. Levy. So, as a matter of logic, and even if you fully credit his testimony -- which we submit, humbly, is a stretch -- but if you fully credit Dr. Nelson Levy's testimony, he does not get you home.

He cannot say that the six supply agreements and the six product licenses together are worth less

than $54 million. He did not provide the Court with that testimony. And that alone is reason enough to dismiss this case.

Moreover, Your Honor, he testified point blank that the drug products that were licensed don't have a value that's zero. Mr. Curran asked him, are these products worth zero, $10 or $100 million? And he testified time and time again with Prevalite, pentoxifylline, Klor Con 8, he would say, I can't say it's worth zero, I just -- and I don't have any value that I've calculated myself.

Finally, Dr. Levy -- and you'll recall, Dr. Levy's the one who wants as a matter of due diligence to have liver biopsies -- Dr. Levy does not give any quantitative measure of Niacor-SR.

That brings us to Joel Hoffman. Joel Hoffman greatly simplified defendants' proof or respondents' proof. Forgive me, Your Honor. He said two things that I think conclusively put to bed the 180-day issue.

First, whether it's the general intent of Section 1 or the specific intent of the specific intent to conspire count of Count 4 that is brought against Upsher-Smith, he testified based on 38 years, an impressive number of years of divining the intent of the FDA, that if he had been asked on June 17th, 1997,

he would "have no idea what the Hatch-Waxman effect would be of a settlement agreement." No idea. Frankly, at that point, I think any chance that they had an intent case went out the window.

Second, he testified in a way that perhaps surprised complaint counsel that under all outcomes, the 180 days would apply. He testified the 180 days would apply if Upsher-Smith won the litigation; that is, if they won the trial and they won the appeal, there would be 180-day bar imposed by the statute. Then he testified that if you lost and went all the way to 2006, because Upsher-Smith was the first filer, there would still be 180 days. Finally, he testified that any version of the settlement permutation, that is, a settlement for 2001 or a settlement for 2002, any one of those permutations would have the 180-day restriction as soon as commercial marketing began.

In short, Your Honor, win, lose or draw, it doesn't matter what this Court does or what Ian Troup did in 1997. Because he's a first filer, Joel Hoffman says there will be 180 days, regardless of what Upsher-Smith does in this case.

The second part of my argument, Your Honor, which is made somewhat in our brief, but I want to just summarize the consequence -- by the way, that's it,

Your Honor, six fact witnesses. Now, there were some depositions and IHs. The Court has already ruled on the investigative hearings. Those can't be used against Upsher-Smith if they're coming from Schering, if it's Mr. Kapur or others or Mr. Driscoll.

As to the depositions, there was testimony that I recall that talked about Mr. Troup asking for a payment and then being rebuffed by Schering. That doesn't prove anything. That doesn't tell this Court what, if anything, is anti-competitive about the June 1997 agreement.

And thus, Your Honor, I would make the following four contentions:

First, there is no proof of a reverse payment. Nelson Levy's testimony, even if fully credited -- which is quite a stretch we submit -- even if it is fully credited, he does not give the Court an evidentiary basis for concluding that the 12 pieces of consideration together don't match $54 million. That's Bresnahan's measuring yardstick. Moreover, both Levy and Bresnahan say each item of consideration has value. That's the zero, 10, 100 question that was asked of Mr. Levy when he sat in that chair.

Point two, there is no prima facie rule of reason case. Now, I'm not going to spend time on per

se, Your Honor, but there's no basis for per se characterization. This is a brand new area of endeavor, and as long as we've all stared at that June 17, 1997 agreement, it is not facially anti-competitive. The second the Court factors in the patent, which goes out to 2006, you realize that more than half of the patent has been shaved off. Moreover, the thin read that complaint counsel hang onto, that lead-in language in paragraph 11, doesn't change a thing, because the subparagraphs talk about royalties.

They cannot dodge the responsibility as the parties bringing this party to this courtroom that they have a responsibility to demonstrate both the fact that there was a reverse payment and that the rule of reason does not apply. But, of course, the rule of reason does apply, because we're talking about a very novel restraint.

Moreover, Your Honor, we go back to Professor Bresnahan. Professor Bresnahan testifies unequivocally that more than half the life of the patent came off based on the agreement.

Second, he testified that it was pro-competitive, that Upsher-Smith, which was locked into the United States and had no sales force overseas, that was pro-competitive for it to get access to the

rest of the world.

And third, he testified that there were opportunity costs of litigation. He also testified he didn't even look at the outcome that would have occurred had litigation ensued.

Finally, if one takes a brief look at the Bresnahan test, the Bresnahan test does not support a rule of reason assessment.

You can stare at the Bresnahan test as long as you like, but you won't find the following things, Your Honor:

You will not find a net weighing of pro and anti-competitive elements, it's not present, and you will not find any time element. That's the critical ingredient that is pro-competitive here that Professor Bresnahan does not take into account.

With that, I turn to my third point, Your Honor, which is no proof of market power or monopoly power. When this case began, we were hearing all about monopolies, monopoly this and monopoly that, and we saw the chart with the three circles, and that was the monopolist's incentive. The monopolist has gotten very small in this case, and that's because the "monopolist's" -- in quotes -- own documents show that seven out of ten prescriptions in the United States are

filled with something other than the monopolist's product, and those products aren't different. They're therapeutically equivalent.

And by the way, Professor Bresnahan testified there's no special subgroup that can only take K-Dur 20. That's one of the seven practical indicia under Brown Shoe.

Now, I won't belabor the point, we make the point at length in our brief, but nowhere is there proof of the original product market. Instead, they shift to Indiana Federation of Dentists, and Your Honor, if you read that case carefully, you will conclude that Indiana Federation of Dentists, the Supreme Court was not, as you are here, presented with no defensible product market.

Instead, the dentists, the renegade dentists that were forbidding x-rays from being shared with insurance companies, they comprised 100 percent of one community and 67 percent of another community. That was their market share. And the Supreme Court said, these are isolated towns. We're willing to presume that there were anti-competitive effects, and moreover, the Commission showed anti-competitive effects.

The Courts of Appeal subsequent in Indiana Federation of Dentists have very rarely considered

this. This is considered the minority way to try to prove anti-competitive effect. And to do it in terms of price, it cannot be done given the testimony of Bresnahan, because Bresnahan already gave up the ship when he said that the other products have comparable pricing.

In terms of output, there is simply no debate on output. At all times, this monopolist was expanding its output, trying to take away sales from the generic and the branded potassium.

I turn now to specific intent. There simply is no evidence in this case that approaches what Judge Motts described in the Microsoft case, that Upsher-Smith had an intent to further Schering's sales. Upsher-Smith has never had that intent, not before June 17th, not in entering the June 17th agreement and the yelling and screaming and fighting to get a September 1 date, and certainly not after. As Professor Bresnahan testified at length, there were numerous activities by Upsher-Smith to drive sales after June of 1997.

That takes me to mootness, Your Honor, and I'll close on mootness. This case is moot. On September 1, with 100 million tablets, the largest product launch in Upsher-Smith's history, they launched the Normandy Invasion of product launches. Now, they could have

accelerated this case and been before Your Honor before September 1. They chose not to.

The 180 days has also expired, and they give that up in their responsive papers, which is again stunning, but moreover, Your Honor, that's a stunning admission by complaint counsel, because there cannot be another first filer.

With that, Your Honor, I will stand on our original brief. We would hope that you'd be able to look at our reply brief, and I would simply say this: The American consumer has greatly benefitted by the aggressive competition provided by Upsher-Smith before 1997, during 1997 and up until this very minute.

JUDGE CHAPPELL: I haven't seen your reply. I know it's been filed. Are you telling me that basically you are just pointing out things that are not consistent, are bad record cites, is that what you've told me?

MR. GIDLEY: Well, I do respond, Your Honor, to the shift that the case has taken --

JUDGE CHAPPELL: Because according to this, it's 21 pages.

MR. GIDLEY: Right, and there are certainly other points in that brief, but I'm responding to the new case, not the case that was in Ms. Bokat's opening

statement, not the case that was in Professor Bresnahan's report, but the new case, which is Indiana Federation of Dentists, where they are going to try to show a reduction in output and an increase in price, and that is not supported by the record either, Your Honor, and that's a new case. That's different than a Brown Shoe case.

JUDGE CHAPPELL: Okay, thank you.

Ms. Bokat?

I'm sorry, Mr. Nields? You had filed a joinder, is that correct?

MR. NIELDS: We have filed a joinder, and we join in the oral argument that Mr. Gidley has just made, but I would like to add about a minute's worth of my own, if the Court please.

JUDGE CHAPPELL: Okay.

MR. NIELDS: Your Honor, as we understand it, complaint counsel has proffered Professor Bresnahan with a three-part test that must be met before they claim that they have established an anti-competitive effect from these agreements, and the first prong of Professor Bresnahan's test is monopoly power. They've referred to it as the monopoly power screen. They have to get through that or their case fails, and we submit that they have failed to get through the monopoly power

screen for a very simple reason.

Professor Bresnahan has testified that in his opinion, Schering had monopoly power in K-Dur 20, and in doing so, he has failed completely to take account of the many potassium chloride supplements on the market that are substitutable for K-Dur 20. He has simply ignored them. He has testified that they are out of the relevant market.

The testimony, Your Honor, is uncontradicted that these many other potassium chloride products are substitutable for K-Dur 20.

JUDGE CHAPPELL: You're supposed to be talking about case in chief only of the plaintiff right now or the complaint counsel. Are you getting into things you've offered in your case?

MR. NIELDS: No, Your Honor, I'm getting into the testimony of the three fact witnesses that Mr. Gidley mentioned --

JUDGE CHAPPELL: Okay.

MR. NIELDS: -- and only those, Your Honor. Each one of them testified that K-Dur 20 is therapeutically the same as the other potassium chloride products, and Professor Bresnahan -- they are clearly substitutable by consumers for the same purpose, and that means under the law that before you

address or answer the monopoly power question, you have to take those products into consideration.

They are substitutable, the record is unambiguous on that point, and Professor Bresnahan has simply testified that he ignored them, he ruled them out. There is no precedent for that at all, Your Honor, and I think what complaint counsel is going to argue is that he can rule those out if he can show that a brand name will lose sales to a low-priced generic and that that's enough.

First of all, there's no precedent for that. There's nothing in the law that says you can ignore substitutable products when you're addressing monopoly power.

And second, Your Honor, if they could prove monopoly power that way, it would mean any time a state has a law saying that for a branded product, a salesperson can substitute a low-priced, unbranded version of it, it would mean that that brand name product had monopoly power. It would mean any brand name product in the country has monopoly power, and that proves way too much.

Thank you.

JUDGE CHAPPELL: Thank you.

Ms. Bokat?

MS. BOKAT: Thank you, Your Honor.

The legal standard for Upsher's motion to dismiss, now joined by Schering, is whether there's reliable record evidence to support the complaint. Reasonable inferences can be drawn from the evidence, and the evidence must be viewed in the light most favorable to the complaint. Where there's evidence to support the complaint, the motion to dismiss must be denied.

As you've correctly pointed out when talking to Mr. Nields, what we're looking at for the purposes of these motions is just complaint counsel's case, not the defense.

The complaint in this matter charges that Schering paid its generic rival, Upsher-Smith, $60 million for an agreement not to come into the market for the succeeding four years. The complaint charges that the agreement is an unlawful horizontal restraint. The complaint also charges an act of monopolization. And the complaint charges conspiracies to monopolize, including one conspiracy between Schering and Upsher-Smith.

On the horizontal restraint, an agreement between competitors or potential competitors that governs the way they compete is a horizontal restraint

of trade and unlawful if it unreasonably restrains competition. This agreement between Schering and Upsher-Smith is plainly anti-competitive and has no plausible justification, so the agreement is an unlawful horizontal restraint.

On monopolization, the agreement between these two parties is an unlawful act of monopolization because Schering had monopoly power and maintained that power through exclusionary conduct. On the conspiracy to monopolize, these two parties entered into an agreement, took actions in furtherance of that agreement with the specific intent to maintain Schering's monopoly and to share the resulting monopoly profits, which is ample evidence of a conspiracy.

The case in chief contains ample evidence to support these violations charged against Upsher-Smith and Schering-Plough. It's interesting to me that a lot of the argument we've heard so far this afternoon has been focused on the live testimony. We must bear in mind that the case in chief also includes a large number of exhibits that also support and prove these allegations.

First, the payment not to compete. The complaint rests on the premise that Schering paid Upsher-Smith in exchange for Upsher's agreement to stay

off the market. There's no dispute here that Schering actually paid the $60 million and that Upsher-Smith, indeed, stayed off the market until September 1st, 2001. The dispute is whether the payment was for the agreement to stay off the market.

Respondents' only explanation for the payment was that it was for the licenses from Upsher-Smith back to Schering, but if the $60 million wasn't for the licenses, the inescapable conclusion is that Schering paid Upsher-Smith to secure its agreement to stay off the market.

The most direct evidence that the $60 million was not for those licenses is the agreement itself, which provides that those $60 million in payments were consideration for paragraphs 1 through 10 of the agreement, which, of course, includes paragraph 3, Upsher's commitment to stay off the market until September 2001.

There is evidence beyond the agreement itself, however. Schering had a strong incentive to pay Upsher-Smith for delay. Schering expected generic entry as early as 1997 and anticipated that its own sales and profits would plummet once it faced generic competition. That made delaying such generic competition profitable for Schering-Plough.

Upsher-Smith, as we see from its forecasts, was also very aware of the impact that its generic competition would have on Schering's sales. Upsher asked for compensation in exchange for staying off the market. Schering concluded, as its management told the Schering board, that compensating Upsher for staying off the market was a prerequisite to any settlement deal.

The payment was calculated with reference to the impact on Upsher of giving up its challenge to Schering's patent. The amount of the net present value of Upsher's lost earnings for staying off the market until 2001 Schering calculated to be in the range of $45 to $55 million, and that's what Upsher received. It got $60 million but paid out over two years, so the net present value fell within the range that Schering had calculated.

The executive summary that's part of our case in chief that we talked about at the very beginning of this case outlines Schering's plan for the agreement with Upsher-Smith. The elements of the plan were that Schering would provide Upsher a guaranteed revenue stream. The amount was to be based on Upsher's projected earnings if it did go to market. The net present value of Upsher's projected earnings, as I

said, were $45 to $55 million.

The executive summary also identified, as a possible way to transfer funds to Upsher, purchasing Upsher products under development, but Schering saw a problem with a naked payment to Upsher and concluded that the way to transfer funds to Upsher would be to purchase pipeline products back from Upsher.

That $60 million was far greater than any noncontingent license fee that Schering had ever paid in cash. Schering's due diligence was superficial, and the parties' post-agreement conduct is inconsistent with Schering really being interested in marketing Niacor-SR. Complaint counsel have made a prima facie showing of payment for the agreement to stay off the market for several years.

Now, as to monopoly power, we have not run away from the concept of monopoly power. We have proved Schering's monopoly two ways. Now, Upsher assumes that the only way to prove monopoly power is to define a relevant product market and geographic market, to calculate market shares and then draw an inference of monopoly power. That is one very legitimate way under antitrust principles to define a monopoly, but there is another way.

If you have direct evidence of monopoly power

or proof of anti-competitive effects, that is another, better way to prove a monopoly, and we do, indeed, have such evidence here. We have proof of monopoly power, so that it isn't necessary to define a product market, although we have shown that the 20 mEq potassium chloride supplement is a market.

Monopoly power is the power to control prices or exclude competition. Evidence of restricted output or supra-competitive prices is direct proof of injury to competition and of the actual exercise of market power sufficient to make out a monopoly.

As the Supreme Court said in Indiana Federation of Dentists, since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects can obviate the need for an inquiry into market power which is but a surrogate for the detrimental effects.

A firm with monopoly power may be able to price substantially above marginal cost. The forecasts that were prepared by Schering, Upsher and ESI all make similar projections about the impact of generics and generic pricing on K-Dur's sales. The forecasts show that prior to generic entry, Schering was able to sell

its K-Dur 20 at prices well above marginal cost, but these forecasts were that the generic would be priced at about 50 percent of the K-Dur price.

Now, these generic companies wouldn't be selling these generic products if they weren't going to make a profit from them. So, if they could make a profit at 50 percent of the K-Dur price, K-Dur had a beautiful supra-competitive price before encountering generic competition.

In fact, Schering was planning to offer its own generic through Warrick at a 50 percent discount rate to the brand, which would be profitable to Schering at 50 percent of its branded price. At the time of the agreement with Upsher, Schering had the power to control the price of K-Dur 20, and Upsher knew it.

There were other potassium chloride supplements on the market, but they did not constrain Schering's K-Dur pricing. As Andrea Pickett, the product manager for K-Dur 20, wrote in 1995, and I quote, "K-Dur is priced 40 to 50 percent higher than a comparable generic dose; however, K-Dur's growth has not been significantly impacted by the prevalence of generics in the therapeutic class."

Indeed, Schering's unit sales were growing faster than those of other potassium chloride

supplements, even though one had to pay more to get one K-Dur 20 than one paid for two K-Dur -- excuse me, 10 milliequivalent potassium chloride supplements.

Denise Dolan, Upsher's manager for Klor Con M20, stated in her deposition, "My educated assumption was that the market was trending towards the 20 mEq because of ease of dosing and patient compliance."

Mr. Dritsas said in his deposition, "The 20 mEq has such a large dollar volume and really is such a convenient product for patients," and he went on, "if you can swallow it whole rather than taking two tablets, you can take one, and some people are absolutely willing to pay more for that convenience."

Respondents' counsel talked about potassium chloride products that are therapeutic equivalents, but the therapeutic equivalents don't define the product market. If therapeutic equivalence did define the product market, you'd have every SSRI in the world in the same product market, but I don't think that they would argue that a Prozac is a Zoloft is a Paxil. Therapeutic equivalence is not the pressure of a product market.

Granted, all potassium chloride supplements contain potassium, but that ignores the characteristics that made K-Dur 20 unique, the amount of the dose

contained in the pill and the advantage for the GI tract and the sustained release technology in Schering's K-Dur 20. Those characteristics set K-Dur 20 apart.

The experience in the market since September 1st of last year shows that K-Dur 20 had monopoly power prior to generic entry. By November, there were more prescriptions for 20 mEq tablets dispensed as generics than for the brand. What the three companies forecasted came true. Sales of these new generic 20 mEq tablets, the Upsher product and Schering's Warrick product, came at the expense of K-Dur 20 and had little impact on the sales of other potassium chloride supplements.

Now, the generic substitution laws don't mean that this wasn't a product market. They simply are an impetus in the shift away from the branded product to the A-B rated generics once they hit the market. In other words, the Upsher 20 mEq tablet, the Warrick 20 mEq tablet. Mandatory substitution laws push -- drive sales toward the generic, but the 20 mEq tablets are still a market, because those mandatory substitution laws don't drive sales to the old 8 and 10 mEq products, and those old 8 and 10 mEq products weren't eroding sales of K-Dur 20. The market share of K-Dur

20 before September 2001 was going up, even as K-Dur prices went up, and the prices of the 8 and 10 went down without taking sales away from the 20 mEq.

There was discussion earlier this afternoon about intent, but Upsher seems to be espousing a criminal intent standard. This here is a civil case, so criminal intent is not the appropriate standard. Even in a criminal antitrust context, the Supreme Court has rejected the consciously desired intent formulation put forward by Upsher-Smith, and the Supreme Court found in U.S. vs. United States Gypsum that proof that the defendant's conduct was undertaken with knowledge of its probable consequences was sufficient to satisfy the Government's burden.

We don't have to show that Upsher-Smith and Schering-Plough engaged in secretive or furtive conduct. We don't have to show that Upsher-Smith's employees knew that its conduct would violate the antitrust laws. Upsher-Smith's intent may be established with evidence that Upsher-Smith would benefit from maintenance of Schering's monopoly and that Upsher-Smith knew or should have known that the challenged conduct would maintain Schering's monopoly.

There is evidence of monopoly here beyond what I've already mentioned. Because the profits to the

monopolist, Schering, exceed the potential economic gains to the entrant, Upsher-Smith, both parties stood to benefit from extending Schering's monopoly. This economic reality created a powerful incentive for Schering to pay Upsher a share of the monopoly profits to buy delay in generic entry. Upsher knew the impact its entry would have on Schering, and Upsher-Smith asked for compensation to stay off the market.

I want to turn only very briefly to conspiracy to monopolize. We don't have to spend a lot of time on that, because that element is proven by the agreement. We have here a written agreement that constitutes conspiracy between these two parties.

Upsher-Smith appears to be arguing that Schering, as the patent holder, was merely enforcing its patent rights through this agreement, but Upsher misconstrues the law. Holding a patent doesn't give a company the right to enter into just any kind of settlement agreement. The Supreme Court has already condemned anti-competitive agreements between parties that had unresolved patent disputes, so holding a patent isn't a blank check to enter into a horizontal agreement to keep your competitor off the market.

There was also discussion this afternoon of mootness, and I think respondent is confusing issues of

what relief might be requested in this case with whether the case is moot. Those are two very different issues.

It may be that as to relief, we're never going to be able to go back to the period in the middle of Upsher's 180 days. There is still ample room for appropriate relief, however, because Upsher-Smith is still in the pharmaceutical industry, and it could very well enter into a similar agreement in the future, maybe with a different company, maybe concerning a different product, but that is reason for relief.

Relief, however, doesn't go to mootness. There was an agreement. Nothing is ever going to erase that agreement. That agreement established a violation of the law. The agreement and the violation are not moot.

As the Supreme Court said in U.S. vs. W.P. Grant, even total abandonment of allegedly unlawful conduct doesn't make it moot, and Upsher never abandoned its conduct. It abided by the agreement, and it enjoyed the $60 million.

The Government has presented ample evidence of a horizontal agreement that unreasonably restrained trade of monopolization and of a conspiracy to monopolize, so the complaint should not be dismissed.

Thank you, Your Honor.

JUDGE CHAPPELL: Thank you, Ms. Bokat.

MR. GIDLEY: May I rise briefly, Your Honor?

JUDGE CHAPPELL: Emphasis on the "briefly," Mr. Gidley.

MR. GIDLEY: Thank you, Your Honor.

JUDGE CHAPPELL: Go ahead.

MR. GIDLEY: I'll just make a couple of points, Your Honor, to Ms. Bokat.

The first is in response to the Andrea Pickett memoranda. That memoranda is one that we showed Dr. Bresnahan, and it shows unequivocally that K-Dur 20 had a TRX -- which, by the way, we think is the right way to look at the market share -- because TRX is when the demand curve starts a TRX market share of only 29 percent. That's below the threshold the courts hold as a matter of law would be sufficient for market power much less monopoly power.

The second point I would make, Your Honor, is in response to this notion of due diligence. The world, as I understand antitrust law, is divided into sham transactions and genuine transactions. There is not under either Section 1 or Section 2 a negligent transaction. If Your Honor will recall the trial brief of complaint counsel, it was most explicit. There were statements like, "Niacor-SR was a veil for compensating

Upsher-Smith." There was another -- that was at page 26. There was also a quote in that brief that talked about, "This case is about competitors using licenses as a cover for a payment not to compete." That position, Your Honor, has now been squarely abandoned by complaint counsel.

They now state, and I'm putting on the ELMO page 6, "This case does not challenge the licenses themselves, notwithstanding repeated claims by Upsher that we must prove a sham, and our case does not require that we establish quantitative value of the Niacor-SR license and other licenses. We do not contend that the Upsher-Smith products had no value."

The reason for that concession, Your Honor, is because both of their valuation witnesses, Dr. Nelson Levy and Mr. Bresnahan, both testified that all of the elements granted in paragraphs 7 through 10 had value.

Third, Your Honor, the notion that these projections, like 1596, what I call the X chart, which shows the Klor Con M10 versus the Klor Con M20 and that there were projections showing that that phenomenon would occur, again, that only demonstrates that mandatory state substitution laws work when obeyed.

Fourth, the notion that rebate -- strike that, that -- excuse me, the notion that there is a pricing

difference that's been established has not been comprehensively established. Dr. Bresnahan testified, as we noted in our brief, he did not review rebates, he did not review competitors' prices, he didn't have access to five years of pricing data. He simply didn't have the answer.

I will turn now to my final point, Your Honor, which is mootness, and with respect to mootness, as I understand Ms. Bokat and the response of complaint counsel, they essentially concede that we were the first filer, that on September 1, we started aggressively marketing our product, the very first day that we could, and on February 28th, 2002, the 180 days expired, and because we're the first filer, this "violation" cannot recur in this line of commerce. There won't be a second filer for K-Dur 20. It's over with respect to K-Dur 20.

The only response I detect from complaint counsel, Your Honor, is "Upsher is still in the pharmaceutical industry." We respectfully submit to complaint counsel that being in the pharmaceutical industry is not a status offense. It is not like being a heroin addict or being an alcoholic. The law does not make illegal participation in this industry.

In short, Your Honor, there is no case on

product market with respect to Brown Shoe. There was no proof of a reverse payment. We greatly respect the advocacy of complaint counsel, but in all due respect, the six live witnesses and additional testimony do not establish a prima facie case under Uarco.

JUDGE CHAPPELL: Mr. Nields?

MR. NIELDS: Nothing further, Your Honor.

JUDGE CHAPPELL: Thank you.

Ms. Bokat?

MS. BOKAT: Very briefly, please.

JUDGE CHAPPELL: All right.

MS. BOKAT: A couple of points. Number one, we're again forgetting the exhibits. It's not just testimony that constitutes our case. There's ample evidence in the exhibits as well.

The other is this business of sham. Complaint counsel never said the Niacor license was a sham. We said the $60 million was not for that license. The milestones and the royalties as a percentage of sales may have been perfectly appropriate, and we're not saying that Niacor as a product had no value. What we say is that Schering didn't pay the $60 million for a license to Niacor.

Thank you, Your Honor.

JUDGE CHAPPELL: Okay, let's move to the

exclusion of rebuttal witnesses.

MR. CURRAN: May I be heard on that, Your Honor?

JUDGE CHAPPELL: In a moment, Mr. Curran.

MR. CURRAN: Sure.

JUDGE CHAPPELL: Ms. Bokat, which witnesses do you intend to call tomorrow?

MS. BOKAT: Mr. Patel, Mukesh Patel.

JUDGE CHAPPELL: Just one?

MS. BOKAT: Yes, sir.

JUDGE CHAPPELL: And then which witnesses do you intend to call after Mr. Patel?

MS. BOKAT: On Thursday would be Michael Valazza and Professor Adelman. Friday, James --

JUDGE CHAPPELL: You only have two available Thursday?

MS. BOKAT: That's correct.

JUDGE CHAPPELL: And only Patel tomorrow?

MS. BOKAT: Right.

JUDGE CHAPPELL: What's your length of anticipated direct examination of Patel?

MS. BOKAT: I'm not doing the direct of Mr. Patel, Your Honor, so I can't give you an answer to that.

JUDGE CHAPPELL: Can you get an answer?

MS. BOKAT: Yes.

JUDGE CHAPPELL: Okay.

And then -- so, you have two people that are available Thursday?

MS. BOKAT: Right.

JUDGE CHAPPELL: And at this time, I have no objection to Adelman. Is that right?

MR. CURRAN: That's correct, Your Honor.

MS. SHORES: That's correct, Your Honor.

JUDGE CHAPPELL: Thank you.

You have no one else available on Thursday?

MS. BOKAT: That's right.

JUDGE CHAPPELL: What about Friday?

MS. BOKAT: Friday, James Egan and William Groth.

JUDGE CHAPPELL: Okay, thank you.

Do the respondents have any objection to me considering oral argument at this time on William Groth?

MR. CURRAN: No, we're comfortable addressing that right now, Your Honor, as well.

MS. SHORES: That's fine with us, Your Honor.

JUDGE CHAPPELL: Ms. Bokat, we are going to begin with that. Do you want to present oral argument on your motion for leave to call William Groth as a

rebuttal witness?

MS. BOKAT: Mr. Orlans was going to handle that argument, if the Court please.

JUDGE CHAPPELL: All right.

MR. ORLANS: Your Honor, I'm happy to do it in this fashion. In the alternative, we could just include Dr. Groth's testimony in the context of the entire rebuttal case, whichever the Court would prefer.

JUDGE CHAPPELL: I'm going to take these witnesses one at a time, so prepare your notes accordingly. I have to manage this somehow. This is how I'm going to manage it. I don't need the intro arguments about what the law is and what precedent is. I just want to get to the witnesses.

MR. ORLANS: Okay. I would like to make one overarching point, Your Honor, that I think applies both to Mr. Groth and also to a number of other witnesses, though, and that is that these are companies that have been focused on by the respondents in the course of their defense case, and we've heard a lot of secondhand testimony about what these companies did or what they thought or how they responded. We think it's important to the Court and important to the record to bring these companies in one by one and give them the opportunity to respond.

Now, with respect to Mr. Groth, who is a pharmacist at Walgreens, essentially he will be coming here, Your Honor, to talk about therapeutic substitution. As the Court will recall, what we raised in our case in chief was the question of substitution of an A-B generic, and that was the thrust of our case, was how an A-B generic could be substituted for a branded product for which it was A-B rated and how a non-A-B rated generic was not subject to that kind of substitution.

In response, the respondents came forward and argued what we've called therapeutic substitution; that is, that it's a simple matter for a busy pharmacist to pick up the phone and call busy doctors and be able to substitute a therapeutically equivalent product, even though they couldn't substitute it without making such a phone call. I don't know about the Court, but I personally find it very difficult to get my own doctor on the phone. I don't know how pharmacists do this, but that was the testimony that you heard from the respondents, that the pharmacists routinely call physicians to substitute for K-Dur 20 and to substitute, for example, two Klor Con 10s for K-Dur 20.

JUDGE CHAPPELL: And it's your position you had no idea that that was coming into evidence in this

case?

MR. ORLANS: Well, Your Honor, I couldn't go quite that far. I can certainly tell you that there have been a lot of witnesses dropped in this case, so it wasn't clear what was and wasn't coming in. Certainly that was an argument in the background, but frankly, Judge, that's not the scope of rebuttal here. We're not required to anticipate everything that respondents will or won't argue.

JUDGE CHAPPELL: I think you'll agree that I'll decide what the scope is. Is that correct, Mr. Orlans?

MR. ORLANS: Well, that's correct, Your Honor. Of course, ultimately the Commission is the fact finder, and it is important that they be presented with as full a record as possible.

JUDGE CHAPPELL: I did see that in your brief.

MR. ORLANS: Okay.

JUDGE CHAPPELL: But I would prefer it if you would just answer the questions I ask you directly, okay?

MR. ORLANS: That's fine, Your Honor.

Yes, if the question is was that ever raised at a deposition, I suppose it was raised in a deposition, that's certainly true, but it was certainly not part of our case in chief, and what we would -- and in

addition, Your Honor, insofar as Walgreens is concerned, we never in our case in chief mentioned Walgreens, and, in fact, what the respondents did in the course of the case in defense was hold Walgreens up as the poster child.

There was testimony from Mr. Dritsas that Walgreens mandated substitution of two Klor Con 10s for a K-Dur 20. That was specifically in the record at, for example, transcript 4683, where Mr. Dritsas so testified. So, we didn't single out Walgreens, Your Honor. The respondent singled out Walgreens, and we think under those circumstances it's appropriate for Walgreens to come in here and tell Your Honor exactly what their policies were.

Let me just point out, too, Your Honor, that although respondents have complained about discovery issues that this raises, I think that any discovery questions are of respondents' own making given the fact that they were the ones who raised the issue of Walgreens in the first place. We did not mention Walgreens in our case in chief.

JUDGE CHAPPELL: Have you offered to them to form a stipulation as to what Walgreens will do with substitution?

MR. ORLANS: We haven't, Your Honor, and that

might be an avenue to pursue. We have also offered a deposition of the witness beforehand, might also be a way of trying to circumscribe what the testimony might be.

JUDGE CHAPPELL: So, if I understood you correctly, you first heard about Walgreens' substitution policy during -- which witness was it?

MR. ORLANS: It was Mr. Dritsas, Your Honor, at transcript 4683, among others. I think he reiterated it at a later point.

JUDGE CHAPPELL: And you basically want to rebut that he's wrong.

MR. ORLANS: That's correct.

JUDGE CHAPPELL: His testimony about Walgreens is wrong.

MR. ORLANS: That's correct, and that Walgreens did not have such a policy and that Walgreens, like other large pharmacies, did not routinely make these kinds of phone calls and routinely substitute -- try to therapeutically substitute non-A-B generics.

JUDGE CHAPPELL: Do you contest the fact that Mr. Dritsas may have been wrong, Ms. Shores or Mr. Curran?

MR. CURRAN: Yes, Your Honor, we do contest that. In fact, we believe that he was demonstrably

right, although Mr. Orlans I think has slightly mischaracterized what Mr. Dritsas said. Mr. Dritsas did not say that pharmacists routinely called or that Walgreens, they routinely did substitution. In fact, quite the contrary.

I think Mr. Dritsas said both in his direct exam and on cross that there were unusual circumstances in the summer of 2001, because there was a shortage of K-Dur 20, and he said under those unique circumstances, he noticed -- he detected a significant increase in the sales to Walgreens of Klor Con 10, substituting for K-Dur 20, and he said expressly in testimony on direct that's not quoted in the motion papers here, he said, "I do not know whether or not they called the physicians to get authorization."

So, Your Honor, we submit that this is all a red herring. They're misstating what Mr. Dritsas testified to in order to create an issue where none really exists.

MR. ORLANS: The quote, Your Honor, at 4683 is, "Walgreens's simply mandated that they substitute the product because they didn't have any of the 20 milliequivalent," and we think that this witness will explain that that's not what the company did.

MR. CURRAN: I'm sorry, can I ask what that

page was?

MR. ORLANS: Sure, 4683.

MR. CURRAN: Yeah, I would like to read the next sentence, Your Honor. That says, "I can't say whether or not each pharmacist called the doctor." That's my point.

MR. ORLANS: Well, I think we should find out exactly what went on, Judge, and whether there was a mandated policy and how it worked.

MR. CURRAN: May I address that, too, Your Honor?

MR. ORLANS: I mean, the suggestion -- let me just finish -- the suggestion, Your Honor, and it was rife throughout their case, is that this is a simple matter and that pharmacists call doctors and certainly were doing so with respect to K-Dur 20 on a regular basis, and I think that this witness will certainly shed light on both Walgreens' policy and on whether or not this is the sort of thing that does routinely happen.

JUDGE CHAPPELL: And you were not aware from the depositions and discovery in this case that respondents were going to talk about or have witnesses testify about substitution or calling physicians?

MR. ORLANS: We certainly weren't aware of it

to this degree and we certainly were not aware that Walgreens would be used as a specific illustration, any policy of Walgreens to mandate substitutions. Again, I can't say that at some point in the discovery that this issue didn't arise in passing, but we certainly had no way of knowing that this was going to be a major aspect of the argument here.

JUDGE CHAPPELL: Okay, anything else?

MR. ORLANS: That's it, Your Honor.

JUDGE CHAPPELL: Mr. Curran?

MR. CURRAN: Your Honor, the question of generic substitution has been a central feature of this case from day one. It was a focus of discovery. In fact, as we pointed out in our brief that we submitted to you earlier today, ironically, Mr. Dritsas himself was asked questions in his deposition back on August 1st about generic substitution by pharmacists, and he gave extended testimony on that subject. That testimony again, perhaps ironically, was used by Professor Bresnahan in his direct examination in this courtroom as part of complaint counsel's case in chief.

Professor Bresnahan, as Your Honor will remember, testified about switching costs and about what a hassle it was for pharmacists to have to call doctors or doctors' offices to get a switch made from

K-Dur 20 to another therapeutically equivalent product. That wasn't the first time Professor Bresnahan raised that issue. He raised it in his report as well, which was submitted months earlier.

JUDGE CHAPPELL: Does it really need to be a contested issue in this case of what Walgreens would do in that situation?

MR. CURRAN: Frankly, Your Honor, I think this is a very minor point. I think Mr. Dritsas in his direct used Walgreens simply as an illustration of circumstances in which that type of substitution was readily identifiable. It was a recent episode that was in his mind. It's not a big deal. It certainly doesn't open up a whole new can of worms or a whole new unexpected issue. It's a minor illustration of a point that's been at the forefront of this case from day one.

The point of generic substitution, Your Honor, was even mentioned by Ms. Bokat in her opening statement, and a moment ago, when people were talking about complaint counsel's case in chief, Ms. Bokat was discussing that -- the concept of A-B substitution and so forth. I mean, to me, that just underscores that this has been an issue all along.

Mr. Dritsas' testimony was not meant to be revolutionary, it was not meant to introduce any new

topic, and we don't think it did, and he was subject to cross examination on that very point. That's the way you deal with fact issues that arise during a fact witness' testimony. Ms. Bokat did cross examine Mr. Dritsas on that point. I think it was Ms. Bokat.

Your Honor, the pretrial brief of complaint counsel focuses on this A-B substitution and generic substitution generally. Dr. Bresnahan talked about it, as I said. So did Goldberg and Teagarden. Bresnahan had this whole business about switching costs, Your Honor will remember. Mr. Dritsas' testimony was just responsive to that point by Dr. Bresnahan.

One final point, Your Honor, this witness, unlike all of the others that are at issue here, is being raised for the first time, right? Mr. Groth was not on the initial witness list, the revised witness list or the final witness list. I'd never heard of him until Friday. Certainly nothing Mr. Dritsas said can be a proper foundation for the highly unusual raising of a new fact witness halfway through trial -- well, I hope we're past halfway through trial, but in the midst of trial.

JUDGE CHAPPELL: Thank you.

MR. CURRAN: Thank you, Your Honor.

JUDGE CHAPPELL: What's Schering-Plough's

position on this?

MS. SHORES: Your Honor, just briefly, I wholeheartedly concur with everything Mr. Curran said. I would point out that, again, not to rehash the arguments that have already been made, but the issue of generic substitution is one that's been in the case from the very beginning. They asked questions of witnesses about it. The witnesses testified about it in their depositions. If complaint counsel thought that this issue was important enough to have a fact witness on, they could have put them -- put a fact witness on it in their initial witness list, in their revised witness list or on their final witness list. They didn't do any of those three things.

I don't believe that enough of an issue was made out of it at this hearing to justify the bringing in of a brand new fact witness that nobody's ever heard of at the end of the trial. It's just not a big enough issue.

JUDGE CHAPPELL: Do you think it should be a contested issue, what Walgreens would do in this situation?

MS. SHORES: Absolutely not, Your Honor.

JUDGE CHAPPELL: Are you willing to stipulate to that?

MS. SHORES: That what Walgreens would do is not relevant to the issues in the case?

JUDGE CHAPPELL: No, I'm sure you'd stipulate to that. No, what Mr. Orlans has said this witness is supposed to rebut, how they would handle I suppose substitution or whether they would call a doctor or what they would do.

MS. SHORES: Your Honor, I don't want to speak for anybody but Schering on this issue, but as for Schering, I can't imagine that it would be decisive as to what Walgreens Drugstore would do with respect to a potassium chloride prescription. So, I'd be happy to stipulate to that.

JUDGE CHAPPELL: Still holding out on that, Mr. Curran?

MR. CURRAN: May I confer with my colleagues on that for 30 seconds?

JUDGE CHAPPELL: Yes, you may.

(Counsel conferring.)

MR. CURRAN: May I address the point, Your Honor?

JUDGE CHAPPELL: In just a moment.

Mr. Orlans?

MR. ORLANS: Your Honor, one point I would like to make --

JUDGE CHAPPELL: Hang on, I have a question, if I may.

MR. ORLANS: I'm sorry.

JUDGE CHAPPELL: Tell me again the exact nature of the rebuttal this witness is supposed to offer if I allow him to testify.

MR. ORLANS: The rebuttal this witness offers is in two respects, a general respect and then a specific example. What this witness will address is not the general issue of generic substitution of an A-B generic. We've raised that. That's not what we're talking about here. What we're talking about is therapeutic substitution, the effort to switch a prescription at the pharmacy from the branded product to some other product, maybe branded, maybe generic, but some product that's not an A-B rated generic.

That's the kind of substitution that we're talking about that this witness will address, and in that context, the testimony from Mr. Dritsas and also there was testimony from Ms. Freese on this point, the testimony was that essentially that Walgreens had a policy, mandated a policy, because they couldn't get K-Dur 20, they mandated a policy in which its pharmacies would switch people from Klor Con -- from -- excuse me, from K-Dur 20 to Klor Con -- to two Klor Con

10s.

JUDGE CHAPPELL: So, then, true rebuttal would be his position or statement that that's not true with regard to Walgreens?

MR. ORLANS: And explain what Walgreens' policy, in fact, was.

JUDGE CHAPPELL: And tell me again how this rises to the level of a material issue where I should ignore all the rules of discovery, all the deadlines we've had in this case.

MR. ORLANS: Because, Your Honor, the argument that respondents have raised is not an issue of generic substitution. It's the argument that there is therapeutic substitution. They're either using it in support of their product market or of a broad product market, to say that there is no problem for pharmacists to call doctors and switch people from a prescription for K-Dur 20 to any one of a number of other therapeutically equivalent products, and we would like to point out, through this witness, that this is simply not the case.

MR. CURRAN: Your Honor, I can't imagine how it can be new matter when their expert witness in their case in chief, Dr. Bresnahan, talked about switching costs, and it sounds to me like this Mr. Groth would

only come in to bolster or to buttress Professor Bresnahan's switching costs analysis. Under no logical analysis can Mr. Dritsas' testimony be characterized as raising this issue.

JUDGE CHAPPELL: What I'm trying to do is disarm the volatile nature of this issue, Mr. Curran, and assuming that there would be a stipulation that Mr. Dritsas said ABC regarding Walgreens, that's not true; Mr. Freese or Ms. Freese said ABC, that's not true. Would you oppose that type of stipulation?

MR. CURRAN: That type of stipulation I would have to oppose, Your Honor, because we believe that the testimony of these witnesses was accurate.

JUDGE CHAPPELL: Regarding Walgreens?

MR. CURRAN: Regarding Walgreens.

JUDGE CHAPPELL: Anything further?

MR. ORLANS: That's it, Your Honor.

JUDGE CHAPPELL: Okay, thank you.

You will have my ruling on Mr. -- is it "Groth" or "Groth"?

Excuse me, is anyone there?

MR. ORLANS: I'm not sure anyone knows, Your Honor. I'm not the one who's been communicating with the witness. It's "Groth."

JUDGE CHAPPELL: He won't be available until

Friday at the earliest. Is that correct?

MR. ORLANS: That's correct. I think actually he can only appear on Friday, Your Honor, and we had slated it that way so that a deposition could be done prior to that appearance.

JUDGE CHAPPELL: Okay, you will have my ruling on this witness in time to notify him if he doesn't need to come. Let's go on to the respondents' motion to exclude.

MR. CURRAN: Thank you, Your Honor.

JUDGE CHAPPELL: And I want to go one witness at a time, and then I am going to allow the other side to respond.

MR. CURRAN: Okay.

JUDGE CHAPPELL: Let's start with -- I suppose Bell and Patel are intertwined. Let's start with those two.

MR. CURRAN: I think that makes sense, Your Honor, and maybe it will help everyone if I just leave this scorecard up here. We can all keep track of who's who.

Your Honor, in addressing Messrs. Bell and Patel, what I would like to do is to put in context the discussion that's in the papers that you already have, and by that I mean I want to go back to May of last

year. That's when Your Honor first issued a scheduling order in this case, and in that scheduling order, the very first thing on the list was for complaint counsel to provide a preliminary witness list, okay?

For the first witness lists, Your Honor had complaint counsel provide them on their own and then respondents. For subsequent witness lists, it was a simultaneous exchange. So, on June 14th, we got the first complaint counsel preliminary witness list.

This is it, Your Honor, and on that preliminary witness list, two of the prominent names that appear as case-in-chief witnesses for complaint counsel are Daniel Bell and Mukesh Patel of Kos. Okay, that again was back in June 2001.

The next thing under the scheduling order, the next exchange of witness lists was on September 20th, and based on Your Honor's order, at that time, the parties were to simultaneously exchange witness lists, including preliminary rebuttal witnesses, with a description of proposed testimony, okay, that was on September 20th. At that time, we received naturally, in compliance with the scheduling order, complaint counsel's revised witness list.

This witness list also identifies Messrs. Bell and Patel as case-in-chief witnesses. There's Dan

Bell, the very first one listed, and then there's Mukesh Patel right there, same descriptions.

Interestingly, complaint counsel also identifies later in this document their preliminary rebuttal witnesses, and there are three other individuals there but no Mr. Bell or Mr. Patel.

Finally, in compliance with the Court's scheduling order, final witness lists were exchanged in December, and at that time, for the first time, the case-in-chief witnesses for complaint counsel shrank to three live witnesses, and then they identified rebuttal live testimony, and that -- then, for the first time, Your Honor, Daniel Bell and Mukesh Patel were relegated to rebuttal witnesses.

So, we can see from the very start of the case, from the initial witness list all the way until the final witness list, complaint counsel were identifying Mr. Bell and Mr. Patel as case-in-chief witnesses, and that only changed ostensibly as a strategic matter on the eve of trial.

You have our brief on this point --

JUDGE CHAPPELL: You don't think that it's common for one side to decide, well, I'm going to move this person to rebuttal if necessary? I mean, do you find a substantive problem with that, Mr. Curran?

MR. CURRAN: Well, I do find a problem with that, Your Honor, because the papers -- the argument that's been put forward by complaint counsel is that Mr. Bell and Mr. Patel and various of these other witnesses are being called because of some surprise, unanticipated facts that were elicited in complaint -- in respondents' case in chief. We believe that that argument is pretextural. We believe that there was nothing raised in our -- in our defense case that warrants these individuals being rebuttal witnesses, and we do have a problem -- I mean, with the general notion that a party, a plaintiff or a complaint counsel, could at their own choosing for strategic reasons move a witness from case in chief to rebuttal without at least taking a risk that those rebuttal witnesses would be precluded.

Let's take a look at --

JUDGE CHAPPELL: Well, depending on what the other side presented in their case.

MR. CURRAN: Well, I think that's right, but the law that we cited here -- and I don't think there's a serious dispute about what the law says -- for there to be a proper rebuttal witness, two things must happen. One, the matter to be addressed by the rebuttal witness must not have been addressed in the

case in chief of complaint counsel. Secondly, it must be raised in respondents' case in chief, okay?

So, logically, a rebuttal witness, such as Mr. Bell or Mr. Patel, is only appropriate if they're addressing some matter not addressed in complaint counsel's case in chief but then addressed for the first time in respondents' case in chief --

JUDGE CHAPPELL: The problem with your logical conclusion is "must not have been addressed in the first case," that's not always true. Maybe it was presented, but then maybe it was attacked or somehow bent or twisted on the other case.

MR. CURRAN: Well --

JUDGE CHAPPELL: Then maybe they need to do some repair.

MR. CURRAN: Well --

JUDGE CHAPPELL: Let's not rule out that possibility. So, if you are going to get to logic, let's get the right elements in there.

MR. CURRAN: Well, but I would submit that under the authorities we cited, and frankly, I think under the authorities they cited, attacking or otherwise addressing an argument raised in the first party's case in chief is not enough to constitute the raising of an issue to warrant a rebuttal witness.

In other words, the Heatherly case, for example. In that case, the D.C. Circuit said you cannot in rebuttal simply go back and buttress a case-in-chief witness. If that case-in-chief witness testified in the case in chief and his testimony was attacked in the defendant's case in chief, that's not enough reason to warrant a rebuttal witness. It's only when the respondents or defendants raise some new matter, going -- they go beyond the scope of what was covered in the case in chief, that new -- that rebuttal witnesses are authorized.

JUDGE CHAPPELL: But you're betting the whole ballgame on an unpublished opinion there.

MR. CURRAN: I don't think so, I think that case is in line with all the other cases we cited, the Bowman case and various others, and frankly, Your Honor, I think in one of the footnotes addressing the Heatherly case, complaint counsel seems to acknowledge the test here is whether there were new -- there was new theories, evidence and so forth raised in the respondents' case in chief.

What I'd like to do, Your Honor, is to briefly show you the description of testimony for Messrs. Bell and Patel and then explain why that testimony is not responding to anything new or unexpected raised in

defense counsel's -- raised in the respondents' case in chief.

They say Mr. Bell is expected to testify generally about negotiations between Kos and Schering-Plough, about -- that was about the possible co-promotion agreement. Your Honor will recall that Professor Bresnahan testified at great length about that. That was part of his -- he had a term for that test he used, the revealed preference test. He testified that Schering-Plough rejected a similar opportunity with Kos, and that had some implications for the deal they eventually reached with Upsher-Smith.

Nothing new or unexpected was raised on that in the respondents' case in chief. This was a known issue injected into the case by complaint counsel through their expert witness. They had ample opportunity to develop it however they saw fit in their case in chief.

Instead, they chose strategically not to call Mr. Bell, and now they seek to do it. I don't -- you know, Your Honor, a lot of people call that sandbagging.

Other issues, the possible deals with other pharmaceutical companies regarding Niaspan's product. The relevance of that, if any, here, Your Honor, has got to be just due to some analogy with Niacor-SR, but

Your Honor heard extensive testimony about the value or alleged value or lack of value of Niacor-SR in complaint counsel's case in chief. There was nothing unexpected or of surprise in respondents' case in chief.

Other issues, Mr. Bell is also expected to testify about the cross-licensing agreement between Upsher-Smith and Kos related to patents for extended release niacin. That cross-licensing agreement was the subject of ample -- of significant evidence put forth by complaint counsel in their case in chief. Nothing new, nothing unexpected was addressing that in respondents' case in chief.

Your Honor, those are the same issues that complaint counsel intend to raise with Mr. Patel. The first two sentences in their description of what Mr. Patel's going to testify are the same as the first two sentences in Mr. Bell's description. Mr. Bell also testifies about the additional issue of the cross-licensing agreement.

It looks like, Your Honor, I may have left out with Mr. Bell, he's also identified to testify about issues related to marketing Niaspan in Europe. That's an issue that wasn't even addressed in respondents' case in chief at all, to say nothing of no surprise or

nothing unexpected.

Your Honor, what's going on here is complaint counsel, they seem to think that they could choose not to put forth an expansive case in chief. They can come in and have three fact witnesses in their entire case in chief, supplemented with deposition testimony and documents and so forth, but three live fact witnesses, and then, after they see what we're putting forth in our case, then they come back with five witnesses, four of whom were originally on their case in chief witness list.

You know, earlier in this case, Your Honor said you were going to follow procedures down the street at the Federal Court. I don't think this kind of thing would fly in Federal Court, Your Honor. These are -- this is laying in the weeds, waiting until respondents' case is in, and then putting forth rebuttal witnesses probably in a way that we cannot respond.

JUDGE CHAPPELL: I think to be clear, I said if our rules aren't there, then I look to the Federal Rules.

MR. CURRAN: That's correct, Your Honor, and I think that's the case here. I think you have significant discretion on what constitutes the proper scope of rebuttal. I think the cases cited by both

sides in their briefs support that, just as it is in Federal Court, but the guiding principles of that discretion are well settled as well, and those are did the respondents or defendants raise new theories and new issues in their responsive case, and that's not the situation here, particularly with Mr. Bell and Mr. Patel of Kos.

Kos has been a prominent feature in this case from day one. It was mentioned in Ms. Bokat's opening statement. She talked about Schering's negotiations with Kos about Niaspan. As I said, Professor Bresnahan talked about this revealed preference test. The -- the Kos cross-licensing agreement, the Kos negotiations with Schering, all of that stuff was submitted in documents and in deposition excerpts and so forth in complaint counsel's case in chief. There's no good reason for that stuff to be admitted now as part of some rejuvenated rebuttal case.

Thank you, Your Honor.

MS. SHORES: May I be heard, Your Honor?

JUDGE CHAPPELL: Yes.

MS. SHORES: I'd like to focus specifically on what topics complaint counsel raised in their opposition to Upsher's motion. What they said in that opposition was that they needed to hear from Mr. Patel

and Mr. Bell on issues related to the Kos negotiations. As counsel for Upsher has stated, the Kos negotiations were first raised by complaint counsel during their case in chief. That's not an issue that was raised for the first time by either of the respondents.

Specifically what complaint counsel says that they need these gentlemen to testify about is the reason given for breaking off the negotiations by Schering that Kos was insisting on a certain level of primary detailing. That's what they said in their response, which we received a couple hours ago.

Now, that issue was not raised for the first time by respondents, Your Honor, and I submit that that's the standard. It's got to be a new issue that's raised by respondents for it to be proper rebuttal. Otherwise, we'll never get out of here.

The issue of detailing priority was first raised by Professor Bresnahan, I believe, that was the economist who used this chart. This is CX 1576. He went through several characteristics of Niaspan versus Niacor, and one on which he focused was detailing priority. He put a negative in that column for Niaspan and a plus in the column for Niacor.

Professor Bresnahan said -- he said -- I'll try to get this focused -- "It's my understanding that Kos

requested, demanded from Schering detailing priority for its Niaspan product and that that was a negative for Schering." This was an issue that was raised for the first time in this case by Professor Bresnahan on direct.

Similarly, Dr. Levy, who followed Mr. Bresnahan, I believe, testified, and this is at pages 1317 and 18 of the transcript, "The final element was one that was raised by the respondents, and that was the fact that in the very early and essentially preliminary negotiations or discussions that went on between Kos and Schering-Plough, Kos was indicating that it wanted, in order to give the license to Schering for the U.S., it wanted what they referred to as a primary detailing."

Now, it is true that respondents had witnesses testify, Schering in particular had Mr. Russo testify about the Kos negotiations in response to those allegations, Your Honor, and we have done that now, and for them to say that this is a new issue is absolutely not true. This was an issue that they raised. We submitted testimony in response to the testimony by their experts, and it's absolutely not proper rebuttal to bring in somebody else to testify to some other -- to their recollection of the event. They knew this

issue was an issue. That's why they raised it in their direct case.

The second issue they claimed in their response that they needed these gentlemen to testify to was on the issue of due diligence and specifically the need for additional studies and how difficult or easy they were to do. These are the PK studies we've heard so much about. Again, this was an issue that was first raised by Dr. Levy, who testified in his direct about pharmacokinetic studies, he said that they were as easy to do as falling off a log. That's an issue that Dr. Levy raised for the first time in their direct case.

Finally, they said they needed these men to come testify about the reasons why the Niacor project was abandoned by Schering and Upsher. It's not clear to me what Kos can offer on that particular issue, but the issue about the abandonment of that project was again first raised by complaint counsel. Dr. Levy had this demonstrative in which he testified at length, if you recall, about the post-deal conduct of both of the parties. He said they never showed any serious interest in developing the drug.

We, of course, submitted testimony in our case, Your Honor, as to the reasons why the parties didn't show the level of interest that Dr. Levy supposes was

appropriate. Again, we were only responding to the allegation that Dr. Levy made. It's not a new issue.

Thank you very much.

JUDGE CHAPPELL: Thank you.

Mr. Orlans, tell me about Mr. Patel. Tell me what he's rebutting and why it's proper rebuttal.

MR. ORLANS: I'll do that, Your Honor. Can I be permitted to address some of the other issues as well? There were some other points made besides that. I will get to that, but I would like to just provide some background, because we do have some fundamental differences on the law, for instance.

JUDGE CHAPPELL: Go ahead.

MR. ORLANS: Okay, thank you, Your Honor.

Mr. Curran said there was no serious dispute about the law, and, you know, I would beg to differ in that regard. Your Honor has already pointed out that the Heatherly case can't be cited even in the D.C. Circuit because it's an unpublished decision. Putting that aside, we think that Heatherly is readily distinguishable, because it clearly didn't involve anything new, and let me clarify by "new" that "new" doesn't just mean new theories or new issues. In fact, if "new" only meant new issues, there would never be rebuttal, since it would be very rare to have new

issues.

"New" also refers to new evidence, and there's been some clarification of what new evidence means, and I'm citing in particular the Rodriguez vs. Owen Corporation case that's cited in our brief, but this case and the quotation I'm about to point to has been cited in a number of other Courts of Appeals decisions as well, and it says, and I quote, this is at 780 F. 2d at 496, "Logic and fairness lead us to conclude that new evidence for purposes of rebuttal does not mean 'brand new,' rather, evidence is new if under all the facts and circumstances the Court concludes that the evidence was not fairly and adequately presented to the trier of fact before the defendant's case in chief."

In other words, it has to be something that's fully and adequately raised, not just something where respondents here can point to a snippet and says, look, he used the word, which seems to be the test that they're applying here.

Now, what we did, as Your Honor recognized, is that we did focus our case in chief, and we did move witnesses from case in chief to possible rebuttal, and we did that in an effort to streamline the case in chief. All our case in chief is required to do is to establish a prima facie case, and that was what we set

out to do, and we tried to do that in a focused and streamlined fashion in an effort to expedite this proceeding. The fact that evidence could have been presented in the case in chief but wasn't doesn't make it improper rebuttal.

I'd also point out, Your Honor, that these witnesses are no surprise to the respondents, as Mr. Curran amply demonstrated.

Now, in terms of Your Honor's question, essentially in our case in chief, what we asserted was that Niaspan and Niacor should have been treated similarly by Schering for licensing purposes. That was essentially our fundamental contention, and that was the chart that Dr. Bresnahan pointed out or put up on the board, and Your Honor, the detailing point is interesting in that regard, because what Dr. Bresnahan did was he assumed that Niacor got credit for that. He assumed that that was a negative, that the detailing issue cut in Niacor's favor. He made that assumption, okay?

What happened was we asserted that Niaspan and Niacor should have been treated similarly by Schering for the licensing purposes. In response, what they came back with was, oh, no, they shouldn't be treated similarly. Kos was unreasonable in its demands and

behavior, and that was the reason that negotiations broke down. And that's the reason, Your Honor, that we submit that you should hear from Kos in this proceeding, to explain exactly what they sought and why it was reasonable.

In Dr. Bresnahan's chart, he assumed essentially respondents' position. He took that as a given, that the detailing was a problem and therefore something that cut in Niacor's favor. The Kos people will come in here and explain why what they sought was not unreasonable.

In addition, Your Honor, respondents have argued that because niacin was such a well-known compound, extensive due diligence was unnecessary, and the Kos witnesses can come in here and testify and will come in here and testify that there were known problems, that it required careful scrutiny. They spent a lot of time and a lot of money in developing Niaspan, because so little was known about sustained release niacin.

Your Honor, absent these points, we wouldn't be here today asking to have Kos come in. The reason that they're coming in is because these issues were raised by respondents. They were not raised in the case in chief.

In terms of the testimony about Niaspan in Europe, Mr. Audibert testified that sales in the United States adversely affected opportunities in Europe. Kos witnesses are uniquely qualified to come in here and tell the Court exactly what, if any, the effect was on the European opportunities from the limited sales in the United States, at least when the product was first -- was first commercialized.

So, Your Honor, again, I think the point here is that this testimony is entirely responsive to issues raised by respondents. The suggestion that we're trying to sandbag anybody is something that I take significant umbrage at. Our goal here was to try to limit the number of witnesses that had to testify, and had respondents not come in and made the points that Kos was unreasonable in its demands or that extensive due diligence was unnecessary because niacin is so well known, we wouldn't be having this discussion, at least not as to these two witnesses.

Frankly, the argument that extensive due diligence was unnecessary was a great surprise to us. Dr. Levy testified, as Your Honor will recall, that there was not appropriate due diligence here, and we expected respondents to come in and argue, in fact, they had done due diligence. Instead, they essentially

conceded the point. Oh, no, said they, due diligence wasn't done here. It didn't need to be done, because this was a product that was so well understood, so scientifically established, that there wasn't a need for that. And again, I think that the Kos witnesses are uniquely situated to be able to address that.

Thank you, Your Honor.

MR. CURRAN: Your Honor, two brief points in direct rebuttal to what Mr. Orlans said.

I seem to have a habit of pointing out sentences that fall right after sentences Mr. Orlans relies upon. This is from the Rodriguez case. He quoted a sentence there on page 9 -- page 496. Immediately thereafter, the Court says, "We also note that Smith appears to suggest that the availability of pretrial discovery to Olin somehow precludes rebuttal evidence in the case at bar. Such a contention, however, ignores the rule that rebuttal evidence is designed to meet facts not raised before the defendant's case in chief, not facts which could have been raised." So, I think that the Rodriguez case stands in direct conformity with all of the other cases that we have cited.

Secondly, Your Honor, Mr. Orlans held fast to their contention that respondents raised this issue --

these issues relating to Kos. Professor Bresnahan, in his expert report -- I and Ms. Shores have already talked about the revealed preference test. One additional point on that, who did Professor Bresnahan rely upon in giving his discussion about the revealed preference test? Well, Patel, Patel's investigative hearing. Elsewhere there are cites to Mr. Bell's investigative hearing.

Your Honor, Commission staff investigated this for two years, and then there was discovery for six months. It's strange credulity to suggest that they are surprised at the fact that Schering and Upsher would raise these -- would give these responsive -- this responsive testimony and responsive evidence to matters raised by Professor Bresnahan.

JUDGE CHAPPELL: Thank you.

MR. CURRAN: Thanks.

JUDGE CHAPPELL: Anything further?

MR. ORLANS: I have nothing further, Your Honor.

JUDGE CHAPPELL: Mr. Curran, next your motion to exclude Mike Valazza.

MR. CURRAN: Sure. I must have picked up my scorecard there.

Your Honor, will remember IPC, that's the

outside contract manufacturer that Upsher-Smith used for making the powder that ultimately was used in the Klor Con M20 product. IPC came up in complaint counsel's -- more than came up. IPC evidence was relied upon by Professor Bresnahan again in his direct testimony, and he referred to and put up on the screen in this room memoranda relating to Upsher-Smith's lining up of IPC for production at various times.

There was nothing new about any testimony relating to IPC raised in respondents' case. Mr. Valazza again was -- thank you -- Mr. Valazza was on the same earlier witness list that I showed to Your Honor a little while ago, the same situation with Mr. Bell and Mr. Patel, where Mr. Valazza, as well as Mr. Egan, showed up on the very first witness list that complaint counsel provided. That was back in June of last year, and he's another situation where he was moved to rebuttal witness just on the eve of trial.

Complaint counsel cannot credibly claim that there was any surprise or anything unexpected that was raised in respondents' case. They have known about Mr. Valazza, they have known about IPC, they have known about that issue. They are the ones who injected it into the case, and under the authorities that we've provided to the Court, there's no grounds for Mr.

Valazza to be a rebuttal witness for complaint counsel.

Now, what I propose to do, Your Honor, is to sit down, because in a situation like this, I think complaint counsel have to identify why they think there was something new being raised, and then I'd like to respond to that.

JUDGE CHAPPELL: Okay.

Mr. Orlans?

MR. ORLANS: I'm happy to do that, Your Honor, and I think I can be equally brief.

Essentially in our case in chief, what we focused on was Upsher's having scaled up to be ready to go to market in 1998, and in that regard, we mentioned in -- in passing we mentioned IPC just as part of that scale-up. That was the extent of it.

In response in its defense, Upsher-Smith contended that, in fact, IPC's technical limitations and capacity constraints were such that it could not have been ready to go to market, that the company did not have the necessary equipment in place and it was not prepared to go forward in commercially suitable quantities to permit a product launch in 1998. That was in our minds, Your Honor, clearly something that should be rebutted directly by IPC and not something that we injected into this case.

We think that IPC's ability to provide Upsher with adequate commercially available product in 1998 is something that we should hear from IPC and not from Upsher's witnesses telling us about IPC's limitations.

MR. CURRAN: I'm not sure which witnesses Mr. Orlans was referring to, but I suspect he was referring to witnesses Scott Gould and Ian Troup, because those are witnesses referred to in complaint counsel's brief as justifying Mr. Valazza's appearance as a rebuttal witness. Your Honor, it was documents authored by Mr. Gould and copied to Mr. Troup that Professor Bresnahan relied upon in his direct testimony.

In addition, Your Honor, in complaint counsel's case in chief, they moved successfully for the admission of various documents relating to Upsher-Smith's engagement of IPC. Those documents included documents authored by Scott Gould, as I've mentioned, and Mr. Chuck Woodruff. So, again, Your Honor, this is a situation we submit similar to the Bell and Patel situations where complaint counsel, their witnesses, their documents, their deposition excerpts and so forth that they offered into evidence in their case in chief injected the issue into the case.

We responded to the issue, but under the

applicable authorities, that does not justify a rebuttal witness on the matter. There's nothing of surprise, nothing unexpected, nothing unanticipated that came out in the respondents' case in -- in the respondents' case.

Thank you, Your Honor.

JUDGE CHAPPELL: Anything further on Valazza?

MS. SHORES: Nothing from Schering on that witness, Your Honor.

MR. ORLANS: Nothing, Your Honor, I'm sorry.

JUDGE CHAPPELL: What about Egan?

MR. CURRAN: I'm going to sound like a broken record, Your Honor.

Mr. Egan, the same situation, appeared on the witness list, the preliminary witness list, revised witness list of complaint counsel, was relegated to a rebuttal witness strictly as a strategic measure on the eve of trial.

He, interestingly, he was the very first deposition taken by complaint counsel in this case. We were all a little startled. It was at the very outset of discovery, and we received a notice for a de bene esse, a trial preservation deposition, of Mr. Egan, so he had been identified as a trial witness by complaint counsel last June, so nine, ten months ago, and I don't

see how they can claim that his appearance is warranted strictly on new matters raised in respondents' case here, Your Honor.

Secondly, as we state in our brief submitted earlier today -- or actually, I guess in our motion of Friday, the testimony that Mr. Egan is slated for -- again, he's from Searle, as my scorecard indicates, and the relevance of Searle is that, as Your Honor may remember, Upsher-Smith representatives met with Searle as part of their efforts to license Niacor-SR. That meeting was in late May of '97, and that fact and related facts were discussed both by Professor Bresnahan, when he was discussing his market test.

You may recall Professor Bresnahan had a chart listing the responses and so forth that various pharmaceutical companies made to Upsher's licensing effort. Searle was on that chart that Professor Bresnahan testified about.

Searle and Upsher's licensing efforts were also addressed in considerable length by Professor -- by Dr. Levy as well, and various documents from Moreton Company, David Pettit's firm, were introduced in complaint counsel's case in chief. This issue has got complaint counsel's hands all over it, Your Honor, and there's no justification for Mr. Egan to be -- to

resurface now as a rebuttal witness.

JUDGE CHAPPELL: Thank you.

Mr. Orlans?

MS. SHORES: Actually, Your Honor, could I be heard on Mr. Egan?

JUDGE CHAPPELL: All right, go ahead.

MS. SHORES: Thank you.

Again, I'd like to focus on the arguments that complaint counsel makes in its brief that we just got a couple of hours ago. Complaint counsel says that Mr. Egan's testimony -- again, this is a witness who used to be affiliated with Searle -- is necessary to rebut evidence that respondents introduced in their case that Niaspan and Niacor were similar products and of similar value.

I found that quite a surprising assertion, that that could possibly be conceived of as a new issue that had been raised by respondents, particularly given the fact that complaint counsel in its opening statement went on for quite some time but said that, "The evidence will also show that Schering turned down a license for a superior sustained release niacin product about the time it entered into the license with Upsher," and they specifically go on to talk about the Kos product and to assert that the Kos product was

superior to Upsher's in several respects. This is an issue that was first joined quite clearly by complaint counsel in its case in chief.

Again, not to belabor the famous revealed preference test, but this entire chart was about the similarity or lack thereof between Niacor and Niaspan. This is an issue that Professor Bresnahan and Dr. Levy spent quite a bit of time on. It's an issue that they raised.

Frankly, just on that issue -- and there are two other issues that they claim they need Mr. Egan for -- but just on the issue of the relative value of Niaspan and Niacor, that issue is one that is beyond the scope of the matters that he is listed in the witness list as being designated to testify on. What they claimed there was that Mr. Egan would be called to testify about Searle's procedures for evaluating products for licensing, and I'll get to that in a minute, but also about negotiations between Upsher and Searle and also about negotiations between Kos and Searle.

There's nothing in there about the relative value of Niacor and Niaspan, so it seems to me that on that issue -- I don't mean to take it away to soon, Your Honor -- on that issue, Mr. Egan has not been

properly disclosed as a witness to respondents.

The second issue that complaint counsel says in its brief that it needs Mr. Egan to testify about is Searle's interest or lack thereof in the -- in Upsher's product, in the Niacor product. Again, that was a matter that was covered at length by Dr. Bresnahan. You'll recall he had the -- this was the market test that he testified about, and you'll recall that Mr. Kades led him through a description of the various categories of companies that considered the Upsher license, including those overseas, and then subtracted them all out and got to zero.

Among these was Searle, which Dr. Bresnahan specifically mentioned, and obviously the contention was that Searle wasn't interested in Niacor sufficiently to give a noncontingent payment to it, so it seems to me that was a matter that was first raised by complaint counsel and raised quite at length by them.

Again, Professor Bresnahan also had a demonstrative -- I don't know if you can see this one -- that specifically references Searle, I believe it's on the second column over here, again, and that was specifically referenced in Professor Bresnahan's testimony for the first time. So, it's quite natural

that Upsher would respond to that evidence with evidence from its witnesses about the negotiations with Searle.

And Your Honor, it seems to me that if we're going to go down this road, we could be here with 49 other witnesses testifying about their interest or lack thereof in the Niacor product. It seems to me that it's not a sufficiently relevant issue to justify the bringing of a rebuttal witness to testify about.

Finally, they claim they need Mr. Egan to testify about Searle's due diligence procedures. Again, I agree with Upsher's motion on this point. What Searle's procedures are when evaluating an in-license are of very tangential relevance. We had extensive testimony from Dr. Levy about what he considers to be the industry standard in terms of due diligence. I don't think we need to hear from particular companies about what their procedures are when they evaluate licenses generally.

Thank you, Your Honor.

JUDGE CHAPPELL: Thank you.

MR. ORLANS: Your Honor, in our case in chief, our position with respect to Searle was simply to point out that Searle was many of -- excuse me, let me start again -- that Searle was one of many companies that had

been approached about these products and essentially hadn't purchased the products. That was really the extent of it. It was Upsher that came back and made a big point of trying to establish that Searle -- how interested Searle was in licensing Niacor and that there was testimony about -- from actually three or four witnesses, I think, Halvorsen, Freese, Brown, about an Upsher-Searle meeting in May of '97 and how interested Searle was at that meeting in Niacor.

We think under those circumstances, Your Honor, that that level of detail and that level of interest is something -- and that specific meeting is something that Searle should be here to explain. Searle is uniquely situated here in the sense that they were one of the companies that was considering both of these products in 1997 and will be able to come in here and testify as to their interest in Niaspan and their view that Niaspan was superior, and this bears directly on respondents' contention that the economic value of Niacor and Niaspan were identical.

Again, the chart that Professor Bresnahan put up, his revealed preference test, was essentially to reach some overall assessment of the products for licensing purposes, how they should have been treated, and the conclusion that he reached was essentially that

the products should have been treated essentially the same for licensing purposes.

We certainly did not anticipate that respondents would come in here and make the argument that the economic value of Niacor was equal to that of Niaspan, and we think that Searle's negotiations on both these products will provide the Court with assistance in that regard.

In addition to that, because Searle was involved in negotiations with Kos, the discussions that Searle had with Kos will also provide insight and provide a record for the negotiating strategy and the reasonableness of the requirements and the negotiations in terms of how much Kos was asking for the product and how it behaved in those negotiations.

Insofar as we're talking about Searle's method of evaluating licenses, Your Honor, that will not be a major aspect of this testimony. The only need to discuss the procedures that Searle utilized is simply to put into context Searle's consideration of these two products, not to have the Searle witness testify as an expert on licensing or to hold up Searle's licensing procedures as procedures that were generalizable to the entire industry but simply to provide that sort of factual background.

And in addition, Your Honor, again, respondents have raised the argument -- and I mentioned this before -- that Niacor and niacin -- these are well-understood products that are scientifically accepted, and one of the bits of insight that the Searle witness can provide here is to explain how Searle viewed these products and whether Searle viewed these products as essentially a foregone conclusion that presented no problems or whether Searle was concerned about side effects and other issues that these sorts of products raised because they were not well understood.

So, I think in that respect as well, the Searle witnesses should be heard as proper rebuttal witnesses.

JUDGE CHAPPELL: Thank you.

MR. CURRAN: Your Honor, complaint counsel cannot be surprised at respondents' reliance on the Kos valuation. They have no grounds to be surprised, and their witnesses, Bresnahan and Levy, specifically addressed the Niaspan analogy in their testimony.

There's been no secret of respondents' reliance on the Kos valuation. That's been part of the case from day one. It's been in all of the statements of the case. It's been addressed in all of the depositions and even back to the investigational

hearings.

Secondly, Your Honor, it sounded an awful lot like Mr. Egan was being proffered as a surprise expert witness, because Mr. Orlans was suggesting that he could testify about the comparison between Niaspan and Niacor-SR and so forth. That's an improper rebuttal, particularly from a fact witness.

Finally, Your Honor, the relevance of the perceptions taken away by the Upsher people from the meeting with Searle are relevant because they go to Upsher's state of mind at the time they entered into the transaction with Schering. Mr. Egan's subjective state of mind as to whether or not he was impressed by Niacor as opposed to Niaspan does not have any relevance.

Thank you, Your Honor.

JUDGE CHAPPELL: Let's talk about Dr. Levy.

MR. ORLANS: Your Honor, let me just make one quick point, which is simply that Searle's perceptions -- excuse me, Searle's approach in that meeting could well affect Schering -- excuse me, Upsher's perceptions of that. We don't know what was said and what was done, and only Searle can bring that to the table.

MR. NIELDS: Your Honor, may I ask the

indulgence of the Court just briefly? Ms. Shores and Mr. Loughlin will be handling all of the remaining matters today, and I have a matter outside of the court that I need to attend to. I didn't want to leave without explanation or permission.

JUDGE CHAPPELL: Okay, thank you, Mr. Nields.

MR. NIELDS: Thank you, Your Honor.

MR. CURRAN: You asked about Dr. Levy.

JUDGE CHAPPELL: Yes.

MR. CURRAN: Dr. Levy submitted a rebuttal expert report in this case, and I've put the cover page there on the screen for you, Your Honor. As you can see, it's a comment upon the expert report of Walter Bratic. A perusal of the document indicates that he's addressing Walter Bratic's proposed testimony. He even talks about where he agrees with Mr. Bratic. That's the report -- that's the rebuttal expert report of Nelson Levy.

Our position is, since Walter Bratic did not testify at this trial, Dr. Levy's rebuttal to Walter Bratic is not proper rebuttal expert testimony. It's that simple, Your Honor.

JUDGE CHAPPELL: Anything from Schering?

MS. SHORES: Yes, Your Honor.

Again, I wholeheartedly concur with counsel for

Upsher. This one ought to be an easy one. Dr. Levy submitted a rebuttal expert report. It addressed matters that have not been raised at all. It seems to me that he ought to be excluded along that basis.

In their papers, Your Honor, complaint counsel has identified -- again, these aren't new issues, but a couple of issues they would like Dr. Levy to come back and talk about again. One of those is due diligence. They claim to be -- again, Dr. Levy testified that -- I believe he said that the due diligence that Schering performed was so strikingly superficial as to defy description, or something in equally colorful terms.

In response to that, Schering witnesses explained that they did the due diligence they thought was necessary and appropriate for the product. That is not a surprise to complaint counsel. I cannot believe that they are surprised that we would be taking that position. That's the position that we've taken throughout this case.

Now, again, what they claim they need Dr. Levy to come back and tell us about, to rebut that point, is first of all he's coming to testify about the state of knowledge in the pharmaceutical industry with respect to sustained release niacin products. That's what they've said in their brief is the first issue that

they need Dr. Levy to come back and testify about. That is an issue that Dr. Levy has already testified about at length.

Dr. Levy -- this is in his direct examination, nothing that was elicited by anybody in cross examination, testified that, "the industry has recognized that niacin does have some good effects," he goes on to talk about the good effects of niacin generally, and this is at page 1314 of the transcript. He then goes on to talk about the side effect of flushing that is associated with niacin. He then goes on to talk about sustained release products, the point of which was to reduce the flushing. And then he talks about the side effects of those, again, focusing specifically on toxicity to the liver. This is all in the context of what was known to the industry about sustained release niacin products. He's already testified about that topic.

Again, another topic that they claim they need Dr. Levy to come back and tell us about is what Schering's state of knowledge was with respect to sustained release niacin products. I'm not sure that Dr. Levy's in the best position to testify about Schering's state of knowledge on that question, but again, this is a matter that was raised by complaint

counsel in their case in chief. It was not raised by respondents in our case, at least not for the first time.

In their case in chief -- and this is actually on the day that Dr. Levy testified, they read from the deposition of Marty Driscoll. This is part of the readings that they did, and they read some testimony on page 1404 of the transcript in which Mr. Driscoll said in response to questioning by Mr. Eisenstat in his deposition that, "We were still greatly interested in niacin." He's talking about the Kos negotiations. "We thought that 4 or 500 billion market that I described earlier, that a niacin product that was a sustained release without the flushing would be big in the marketplace. I didn't feel the Niaspan product yielded that."

Again, this is evidence that complaint counsel submitted in its case in chief directly on the question of Schering's knowledge about sustained release niacin products. We don't need Dr. Levy to come back and tell us about that now.

And finally, again, all of these issues are beyond the scope of Dr. Levy's rebuttal expert report, which only went to the issue of the various Schering deals that he talked about at length. That was what

the rebuttal expert report was submitted in response to. Oddly, a witness for Upsher had submitted a report about the Schering other deals.

Again, Dr. Levy testified for several hours on the issue of other Schering deals and Schering's due diligence as it compared with the due diligence that it had done on the Niacor product.

Thank you.

MR. ORLANS: Let me say first of all, Your Honor, that the comment that Dr. Levy made on the report of Mr. Bratic does not define the scope of Dr. Levy's rebuttal testimony. It's true, the respondents did not call Bratic. It is also true that a number of the points that Dr. Levy will be addressing were made instead through factual witnesses, and in particular, Your Honor, we do believe it's surprising that respondents conceded a lack of normal due diligence. We did not envision that happening.

To the extent that the issue was raised, what was raised was they did appropriate due diligence. Well, it now seems that appropriate dual diligence was virtually none, that we were supposed to discern that that's what was meant, and the reason that they needed essentially no due diligence was because this product was so well known and straightforward and well

understood, and that's one of the issues that we think it's important to have Dr. Levy back for, to talk about whether the degree of scientific understanding of niacin would have spilled over to the point where normal due diligence for a product like Niacor would have been unnecessary.

In addition, Your Honor, Dr. Levy talked in the direct about the need to focus on noncontingent payments, and he evaluated products by looking at the noncontingent payments. Respondents have come back and presented evidence that Schering supposedly considers payments other than noncontingent payments when evaluating licensing opportunities, and he mentioned -- they have mentioned, for example, expenses like anticipated research and development expenses prior to approval, and Dr. Levy will address the propriety of considering those kinds of expenses, whether that's consistent with industry practice and how that impacts the evaluation of the Niacor product.

MS. SHORES: Your Honor, if I might briefly be heard in response?

JUDGE CHAPPELL: All right.

MS. SHORES: Mr. Orlans is quite right, I failed to mention one topic on which they claim they need Dr. Levy to come back for, and that was the issue

of the size and types of various payments, the types of licensing payments that there are and how they differ from one another.

Again, Your Honor, this is something that Dr. Levy has already testified about. This is one of a number of charts I could put up here in which he broke down various deal components in terms of noncontingent payments, which were -- he described as the cash licensing fees up here, equity investment, research support, milestone payments and royalty payments. He testified at length about that already.

He said -- and this is just part of his lengthy testimony on this topic, and this appears at pages 1321 to 22 of the transcript, and again, this is his direct testimony under questioning by Mr. Silber. He says, "Going back to the first of these, I think these the are the sort of distinctions I'd like to make clear, if I may, because they're quite germane to the matter at hand. Within this broad category that we refer to as licensing consideration are three types of payments, and they're very different."

Then he talks about cash licensing fees, noncontingent fees, equity investment, and he also testifies again, first in their case in chief, on the issue of research support. "The third one that's also

under licensing consideration is research support," and I'm quoting from page 1324.

Dr. Levy testified about all of these various types of payments, how they stand in relation to each other. These are all issues that were raised for the very first time by Dr. Levy in complaint counsel's case in chief.

Thank you, Your Honor.

MR. CURRAN: Your Honor, this comment upon the expert report of Walter Bratic was submitted by complaint counsel on November 6, 2001, which coincidentally was the deadline for rebuttal expert reports. So, we would indeed be surprised if complaint counsel suggests that Dr. Levy can testify beyond the scope of his rebuttal expert report. That would be a surprise to us.

One other concern we have with regard to Dr. Levy, Your Honor, the brief submitted to Your Honor earlier today indicates that another issue Dr. Levy will rebut is the approvability of Niacor-SR. Your Honor may recall we had considerable discussion in this courtroom about Dr. Bertram Pitt, and Your Honor struck Dr. Pitt's testimony after we withdrew the testimony -- the proffered testimony of Drs. Knopp and Keenan, and Schering withdrew the surrebuttal testimony of Dr.

Davidson.

Your Honor, I do have a concern that Dr. Levy is being proffered to circumvent that ruling and to be a substitute for Dr. Pitt, and I believe that's a fair concern given the brief submitted to Your Honor today.

JUDGE CHAPPELL: Thank you.

MR. CURRAN: Thank you, Your Honor.

JUDGE CHAPPELL: Let's talk about Dr. Bazerman.

MR. CURRAN: Your Honor, I am going to be particularly brief on this witness, because I'm not 100 percent clear on what he's being proffered for, and that's why on my scorecard here I indicate the scope of his testimony is unclear.

Your Honor has already addressed back at the motion in limine stage Professor Bazerman, and at that time Your Honor granted in part and denied in part a motion in limine and stated rather strongly that Dr. -- or that Professor Bazerman could testify but only as a rebuttal witness. I guess we're at the stage now where we have to define the scope of the proper rebuttal for Professor Bazerman.

In our motion, Your Honor, the concern we raised was that Professor Bazerman to us seems to be expressly buttressing the case-in-chief expert testimony of Professor Bresnahan, and our concern is

that that's not proper rebuttal testimony, not proper expert rebuttal testimony. In fact, the proffered use of Professor Bazerman seems to be almost an exact analogy to what was occurring in the Heatherly case that we rely upon. It's not proper for a rebuttal witness to come on the stand and say that he thinks a case-in-chief expert had it right.

Other than that, Your Honor, I'm going to await complaint counsel's --

JUDGE CHAPPELL: I think Mr. Schildkraut would agree with that statement you just made. Go ahead.

MR. CURRAN: Yeah, I hope he would.

With that, Your Honor, I'm going to sit down so I can hear complaint counsel's statement as to the proposed scope of Professor Bazerman's rebuttal expert testimony.

JUDGE CHAPPELL: Okay.

MR. CURRAN: Thank you.

MR. LOUGHLIN: Your Honor, if I could be heard on that?

JUDGE CHAPPELL: Sure.

MR. LOUGHLIN: I agree with everything Mr. Curran said. In addition, Professor Bazerman in his report suggests that he's going to testify to things that other witnesses have already testified to. So,

for example, he proposes to testify as to whether or not the due diligence by Schering was appropriate or not, and Professor Levy, of course, has covered that. He would plan to testify about whether the structure of license payments, up front versus milestones, were appropriate, and again, of course, Professor Levy or Dr. Levy has already covered that testimony.

Again, Professor Bazerman would propose to testify as to whether or not it is appropriate or expected to do license and settlement transactions in the same -- in the same transaction, and both Dr. Bresnahan and Dr. Levy testified about that. And as Mr. Curran mentioned, Professor Bazerman would echo the sentiments of Professor Bresnahan on the anti-competitiveness of the Schering-Upsher settlement and opine as to the antitrust policy and enforcement, which Professor Bresnahan has already covered. Therefore, there is no purpose -- there is no proper rebuttal here by Professor Bazerman.

Your Honor, we also have a separate motion to strike a supplemental report of Professor Bazerman and are prepared to argue that now if Your Honor wishes or later if Your Honor wishes.

JUDGE CHAPPELL: All right, go ahead.

MR. LOUGHLIN: Your Honor, this is a separate

motion addressing an entirely new expert report that complaint counsel submitted two months after the deadline for expert reports, almost a month after the close of expert discovery, and the week before trial started, Your Honor, this was a brand new opinion addressing Professor Bazerman's views on risk aversion.

Complaint counsel never sought the Court's permission to extend any deadlines or to file this supplemental report, and we believe it's proper for the Court to strike this supplemental report under the standard that the Court has already established for this case, which is that if an opinion was not offered in the expert's expert report, it can't be offered at trial, and this is a new opinion which was not offered in a timely expert report. It was offered in a brand new expert report submitted two months late.

Now, Your Honor, complaint counsel does not dispute that the motion was late or that the opinion was late. They don't dispute that it's brand new, and they give no reason for the late opinion of Dr. -- of Professor Bazerman. Their only explanation is that Professor Bazerman hadn't thought of this new opinion at the time he wrote his report, he thought of it later, and therefore, provided it late, and that is not a proper reason for violating the Court's scheduling

deadlines in this case.

Complaint counsel makes two arguments as to why they should be allowed to proffer this new opinion. First, they say that Professor Bazerman offered the opinion in his deposition, and that is true, Your Honor, Professor Bazerman offered this opinion voluntarily, unsolicited by any question from respondents' counsel. Mr. Gidley was questioning Professor Bazerman and was finishing a line of questioning and offered to take a break, and out of the blue, Professor Bazerman proffered this new opinion.

At that point, respondents' counsel, of course, were not prepared to properly examine him on that point, and in any event, a deposition is not the proper time to bring new opinions forth, but that is the purpose of the expert report.

Second, complaint counsel responds that respondents could have deposed Professor Bazerman on this new opinion, and, of course, that is -- it is prejudicial to respondents to have to engage in new expert discovery while they're engaging in the trial of this case, and that, in fact, is the purpose of a scheduling order, is to avoid such prejudice to the parties.

Indeed, under complaint counsel's argument,

they could offer new opinions throughout trial as long as -- as long as a witness was made available for a deposition, and that would render the scheduling order in this case meaningless.

Thank you, Your Honor.

JUDGE CHAPPELL: Okay.

Mr. Orlans?

MR. ORLANS: Your Honor, let me address the motion regarding Dr. Bazerman's supplemental expert report first, and I have to say I find that motion rather astounding. As a trial lawyer who's been practicing for more years than I care to remember, this sort of situation is not unusual.

We went out of our way to provide notice to the other side that there were additional opinions. We supplemented the report, and we gave them the opportunity to take a deposition. This was all done, Your Honor, two weeks before trial. We're talking about something that happened in January. There is simply no prejudice in this.

But even more, Judge, let me point out to you Schering's behavior in this case, since they're the ones who have raised this issue. Both Dr. Willig and Dr. Addanki, in their demonstratives provided to us a few weeks before they testified incorporated in those

demonstratives new opinions. Our response to that was to raise the issue with Schering. Schering offered up both of those experts for additional depositions. Complaint counsel went ahead and took those depositions and proceeded with the examination of the witnesses.

This sort of thing happens on a regular basis in trial. The fact is that we provided notice above and beyond the bounds of reasonableness here. We provided this notice two weeks before trial started. We offered up Professor Bazerman for a deposition. Not only did they fail to avail themselves of that, but in their papers they actually astoundingly ignore that and suggest that a deposition was never offered, despite the fact that it was offered both orally and in writing.

JUDGE CHAPPELL: What about Bazerman's original expert report, was there any mention at all in there of risk aversion?

MR. ORLANS: No, it's only in the supplemental report, Your Honor. It did come up at his deposition, and as soon as it came up and we realized that it was something that the Professor had not thought of before that would be useful rebuttal material, we immediately gave notice, and again, all of this was done as soon as it came to our knowledge and was done well in advance

of trial, and as I say, Your Honor, not only consistent with common litigation practice, but frankly, Your Honor, far more notice than we got when Schering did the same thing with respect to the expansions of testimony of both Drs. Addanki and Willig.

Let me talk about Professor Bazerman. As respondents have not mentioned to Your Honor, Professor Bazerman has already been approved as a rebuttal witness in this case, and Your Honor already made that ruling.

Now, what is Professor Bazerman going to be doing? Well, Professor Bazerman is going to be responding to extensive testimony from respondents' negotiation experts, such as Dr. Mnookin and O'Shaughnessy, and valuation experts. There was testimony, as Your Honor is well aware, that requiring parties to prove that there was no reverse consideration would discourage settlements, and Dr. Bazerman will testify as to that, will testify about such an impact of such a requirement on settlements, and will also testify that pharmaceutical companies don't generally settle by paying generic companies.

In addition, there was significant testimony that settlements with side deals are beneficial to society, and therefore, that side deals should be

encouraged, because they effectuate settlements. Dr. Bazerman will testify that some side deals, while they may well benefit the parties who are involved in them, nonetheless clearly have the potential to harm the consuming public.

JUDGE CHAPPELL: These points you're going over now, were they in his original expert report?

MR. ORLANS: I believe they were.

JUDGE CHAPPELL: Side deals?

MR. ORLANS: I'm not sure that that was the language he used, Your Honor, but certainly in the sense that he was going to be responding to the negotiation experts, I believe that's right.

In addition, Your Honor, the supplemental report does cover the risk aversion point, and as Your Honor is aware, the risk aversion point was made by respondents, particularly witnesses such as Dr. Addanki, who testified at some length about risk aversion, and it was not part of our case in chief.

We think it's appropriate under the circumstances that Dr. Bazerman be allowed to testify in that area, particularly given the fact that respondents have been on notice of this testimony for over two months now.

Thank you, Your Honor.

JUDGE CHAPPELL: Anything else?

MR. CURRAN: Your Honor, I'm going to leave to Mr. Loughlin the question of the rebuttal report, and I'll just briefly address -- I mean, the supplemental report, and I'll just briefly address the rebuttal report.

Your Honor, you asked Mr. Orlans whether the initial Bazerman report addressed the general concept of the side deals and Professor Mnookin and Mr. O'Shaughnessy's testimony. His report did address those points, Your Honor.

My problem with the Bazerman point is we had Bresnahan in the case in chief talk about negotiations, settlement negotiations between brand names and generic companies, and then we have Mnookin and O'Shaughnessy come back in the respondents' case in chief, and then they're proposing that Bresnahan come back to defend his original testimony and Bazerman come in to address Mnookin and O'Shaughnessy as well as others, including economists, even though Bazerman's not an economist.

So, I guess my problem with Bazerman is both the scope of his purported expertise, and also I submit it's not appropriate for him to strictly come on board to support Bresnahan's defense of the Bresnahan test.

I hope that's clear. It is a complicated

subject. Thank you, Your Honor.

MR. LOUGHLIN: Your Honor, just briefly on the supplemental report, the new report was submitted a month after the deposition of Professor Bazerman, not that that is an excuse. I think that is still a month too late -- two months too late, and it was a week before trial.

Now, with regard to Dr. Addanki and Dr. Willig and the Schering conduct, both those experts provided demonstrative exhibits related to their opinions in their expert reports. We did not agree that those offered new opinions, but to avoid any dispute, we allowed very short depositions.

That is not the situation here. It is completely different, Your Honor.

Thank you.

JUDGE CHAPPELL: Okay.

Anything further?

MR. ORLANS: Nothing further, Your Honor.

MR. CURRAN: Nothing further that can't wait until we next convene, Your Honor.

JUDGE CHAPPELL: Is Mr. Patel available Thursday?

MS. BOKAT: Instead of -- excuse me, instead of tomorrow, Your Honor?

JUDGE CHAPPELL: Not instead of, but is he available Thursday as well as tomorrow?

MS. BOKAT: No, I'm afraid he is not.

JUDGE CHAPPELL: Are these witnesses under subpoena? How come these witnesses can't be here? I mean, you've got this list of witnesses and they are here one day, half a day. Are they subpoenaed?

MS. BOKAT: Yes, we subpoenaed them, Your Honor.

JUDGE CHAPPELL: Then why can't Mr. Patel be here Thursday assuming I let him testify?

MS. BOKAT: Well, we had other witnesses coming in from out of town for Thursday.

JUDGE CHAPPELL: And this Mr. Bell whose name I've seen, you didn't give that name to me at all when I asked for availability.

MS. BOKAT: I'm sorry, I answered as to the witnesses this week, Your Honor, and something else came up before I got to next week. Would you like me to go through the list for next week?

JUDGE CHAPPELL: Well, I'd like to know, is it going to be the case that these people are available for one day only?

MS. BOKAT: Well, we've approached the witnesses and tried to find out what days they were

available and then slot them in around one another's availability, and then taking care of special circumstances like the gentleman from Walgreens who needed to be available in case respondents needed to take a deposition of the gentleman, and we have been juggling with short notice and these people's business schedules and the fact that most of them have to come in from out of town.

JUDGE CHAPPELL: Okay, we are going to recess until 5:05.

(A brief recess was taken.)

JUDGE CHAPPELL: Okay, I've reviewed the pleadings, listened to oral argument, and due to the time I've had or not had, I want to refer to the transcript or review the transcript on some of these issues; however, I am going to rule -- partially rule on the pending motion to exclude.

I am going to rule regarding the fact witnesses at this time. My ruling on the experts will come later. My ruling on this Groth or Groth will be tomorrow.

Regarding fact witnesses Bell, Patel, Egan and Valazza, my ruling is as follows:

These fact witnesses will be allowed to testify; however, the scope of the direct examination

will be limited. Upon any objection, complaint counsel shall be prepared to cite to the place in the respondents' case in chief or the respondents' case that they are rebutting. No expert opinions will be allowed from these fact witnesses.

Any questions?

MR. ORLANS: No questions, Your Honor.

MR. CURRAN: I don't think I have any questions, Your Honor.

MS. SHORES: Nothing from Schering, Your Honor.

JUDGE CHAPPELL: Okay, since we have one witness tomorrow, we're starting at 1300 or 1:00 p.m. That's all. We are adjourned until 1:00 p.m. tomorrow.

MS. BOKAT: Your Honor, in light of your ruling, may I raise one point? Remember, at the beginning of the afternoon, I said it might go away?

JUDGE CHAPPELL: False alarm.

MS. BOKAT: Excuse me. This has to do with Michael Valazza, the witness from IPC who is under subpoena. He is prepared to come and testify Thursday morning. Upsher-Smith so far has denied us any access to speaking to this witness before he goes on the stand. They have waved in front of IPC some confidentiality agreement.

IPC said that they were willing to speak to the

Government and they would make Mr. Valazza available to speak to respondents also before he took the stand, but Upsher is still invoking some confidentiality agreement to deny the Government access to information, and I don't know any lawyer who wants to put a witness on the stand without having an opportunity to speak to that witness before he is called to testify. So, I request a ruling from the Court that Upsher-Smith inform IPC's counsel that they have no objection to Mr. Valazza speaking informally to the Government before he goes on the stand.

JUDGE CHAPPELL: Response?

MR. CURRAN: Your Honor, you've already ruled on that motion. You denied it in a written order after the motion was made in writing and we responded to it. I think your ruling was clear, and that is that IPC has got no obligation to meet with complaint counsel.

To be clear, we are not preventing IPC from meeting from complaint counsel. We have simply not waived IPC's confidentiality obligation to Upsher-Smith.

JUDGE CHAPPELL: Ms. Bokat, I thought I had ruled on this. What are you raising that was not raised in your previous motion?

MS. BOKAT: Your Honor, we find ourself now on

the eve of trial -- we were trying to speak to IPC back before the trial. We didn't have an opportunity to do that. We are now right against the time when the man is going to be called to testify, and we still can't speak to him. It's a very --

JUDGE CHAPPELL: Are you saying you can't speak to him because of Upsher-Smith?

MS. BOKAT: Exactly.

MR. CURRAN: I don't think that's accurate, Your Honor. The simple fact is Upsher-Smith has a contract with IPC under which IPC is not to disclose confidential information unless compelled by law. Complaint counsel chose not to depose Mr. Valazza. Therefore, the confidentiality provision was not avoided in that way.

JUDGE CHAPPELL: I am going to treat your request as a motion to reconsider my previous ruling. It's denied. We're adjourned until tomorrow at 1:00.

MR. CURRAN: Thank you, Your Honor.

JUDGE CHAPPELL: Thank you.

(Whereupon, at 5:10 p.m., the hearing was adjourned.)

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: 9297

CASE TITLE: SCHERING-PLOUGH/UPSHER-SMITH

DATE: MARCH 12, 2002

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 3/13/02

SUSANNE BERGLING, RMR

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

DIANE QUADE